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No. .....

In The

# Supreme Court of the United States

October Term, 1984

CAMEO CONVALESCENT CENTER, INC.,
a Wisconsin corporation,

*Petitioner,*

vs.

TERRY WILLKOM,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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## QUESTIONS PRESENTED

1. Should absolute prosecutorial immunity be extended to agency officials whose job duties do not normally include "prosecutorial" functions, but who may influence a decision to prosecute in a specific case for political reasons?

2. Should absolute prosecutorial immunity be extended to persons involved in administrative proceedings which lack the safeguards necessary to act as a check on agency zeal?

3. Should absolute prosecutorial immunity be extended to all claims against a state official who may have influenced a decision to continue that case?

## PARTIES TO THE PROCEEDINGS BELOW

The petitioner, and the appellant below, is Cameo Convalescent Center, Inc., a Wisconsin corporation.

The respondent, and respondent below, is Terry Willkom.

## TABLE OF CONTENTS


| | Pages |
|---|---|
| Questions Presented | i |
| Parties to the Proceedings Below | ii |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Constitutional and Statutory Provisions Involved | 2 |
| Statement of the Case | 5 |
| Reasons For Granting The Petition | 10 |
| I. The Scope Of Prosecutorial Immunity From 42 U.S.C. § 1983 Claims In A State Agency Setting Is An Important Federal Question Which Should Be Decided By This Court. | 11 |
| A. Public Policy Requires That The Prosecutorial Immunity Questions Be Resolved. | 15 |
| B. Willkom Was Not Functioning As A Prosecutor In The Traditional Sense. | 17 |
| C. The Administrative Proceedings Were Not Sufficiently Independent To Qualify For Prosecutorial Immunity Under The Strict Language of Butz. | 23 |
| II. The Court's Order Below, Dismissing The Petitioner's Claims In Their Entirety, Is In Conflict With A Recent Decision Of This Court. | 27 |
| Conclusion | 29 |


## TABLE OF AUTHORITIES

CASES:


*Barr v. Matteo*, 360 U.S. 564 (1959) ..... 12

*Briscoe v. Lahue*, — U.S. —, 75 L. Ed. 2d 96 (1983) ..... 15, 22

*Butz v. Economou*, 438 U.S. 478 (1978) ..... 10, 12, 13, 14, 15, 16, 17, 19, 23, 24, 25, 26, 27

*Cameo Convalescent Center v. Senn*, 738 F.2d 836 (7th Cir. 1984) cert. denied Percy v. Cameo Convalescent Center, 84-505 ..... 6

TABLE OF AUTHORITIES—Continued


| | Pages |
|---|---|
| *Cameo Convalescent Center v. Senn*, 84-680 | 6 |
| *Cameo Convalescent Center, Inc. v. Willkom*, 572 F. Supp. 1244 (W.D. Wis. 1983) | 2 |
| *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984) appeal pending, sub nom. *Demery v. Rowland*, Case No. 84-421 | 14 |
| *Dennis v. Sparks*, 449 U.S. 24 (1980) | 15, 21, 22 |
| *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1980) | 20 |
| *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) | 16, 18, 19 |
| *Harris v. Powers*, 520 F. Supp. 111 (W.D. Wis. 1981) | 24 |
| *Imbler v. Pachtman*, 424 U.S. 409 (1976) | 11, 12, 15, 19, 20, 22 |
| *Jihaad v. O'Brien*, 645 F.2d 556 (6th Cir. 1981) | 24 |
| *Lentsch v. Marshall*, 741 F.2d 301 (10th Cir. 1984) | 24 |
| *Meyer v. Niles Township, Illinois*, 477 F. Supp. 357 (N.D. Ill. 1979) | 24 |
| *Nash v. Califano*, 613 F.2d 10 (2nd Cir. 1980) | 14, 23 |
| *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) | 18 |
| *Pulliam v. Allen*, — U.S. —, 80 L.Ed.2d 565 (1984) | 15, 28 |
| *Redding v. Fairman*, 717 F.2d 1105 (7th Cir. 1983) | 25 |
| *Saxner v. Benson*, 727 F.2d 669 (7th Cir. 1984), appeal pending, sub nom. *Saxner v. Cleavinger*, No. 84-732 | 25, 26 |
| *Tower v. Glover*, 467 U.S. —, 81 L. Ed. 2d 758 (1984) | 14 |
| *Williams v. City of Montgomery*, 742 F.2d 586 (11th Cir. 1984) | 24, 25 |
| *Williams v. Trimble*, 527 F. Supp. 910 (S.D. N.Y. 1981) | 24 |

## TABLE OF AUTHORITIES—Continued


Pages

STATUTES:

28 U.S.C. § 1254(1) ..... 2
28 U.S.C. § 2101 (c) ..... 2
42 U.S.C. § 1983 ..... 3, 6, 10, 11, 23
Wisconsin Laws of 1981, Chapter 121 ..... 3, 4
Wis. Stat. § 15.04 ..... 3
Wis. Stat. § 15.05 ..... 3
Wis. Stat. 1977-1978, § 50.04(4) (d) and (e) ..... 3
Wis. Stat. 1983-1984, § 50.04(4) (e) ..... 4

OTHER AUTHORITIES:

Administrative Procedure Act ..... 14, 15, 23, 24
Supreme Court Rule 17 ..... 10
Supreme Court Rule 20.2 ..... 2
Supreme Court Rule 28.1 ..... 1
United States Code, Title 42: § 1983 Civil Action for Deprivation of Rights ..... 3
United States Constitution, Article XIV, Section 1 ..... 2

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## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI AND APPENDIX

Petitioner, Cameo Convalescent Center, Inc.[1] of Wisconsin, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on December 21, 1984, which affirmed a judgment of the United States District Court for the Western District of Wisconsin in favor of the respondent, Terry Willkom.

[1] Pursuant to Rule 28.1, Cameo asserts that it has no parent company, subsidiaries or affiliates.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unpublished, but is contained in the Appendix at pages 1A to 8A. The decision of the District Court for the Western District of Wisconsin is reported in *Cameo Convalescent Center, Inc. v. Willkom*, 572 F. Supp. 1244 (W.D. Wis. 1983) and contained in the Appendix at pages 11A to 25A.

## JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was entered on December 21, 1984. This petition for certiorari is being filed with the Court within 90 days of the entry of that order as provided in 28 U.S.C. § 2101 (c) and Supreme Court Rule 20.2. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*United States Constitution:*

Amendment to the United States Constitution, Article XIV, Section 1:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

*United States Code:*

United States Code, Title 42: § 1983 Civil Action for Deprivation of Rights:

> "Every person who, under color of any statute, ordinance, regulation, . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

*Wisconsin Statutes*

Wis. Stat. § 15.04

> "15.04 *Heads of departments and independent agencies; powers and duties . . . .*
>
> (2) DEPUTY. Each secretary of a department . . . may appoint a deputy who shall serve at the pleasure of the secretary. . . . The deputy shall exercise the powers, duties and functions of the secretary . . . in the absence of the secretary . . . and shall perform such other duties as the secretary . . . prescribes."

Wis. Stat. § 15.05

> "(3) EXECUTIVE ASSISTANT. Each Secretary may appoint an executive assistant to serve at his or her pleasure outside the classified service. The executive assistant shall perform duties as the secretary prescribes."

Wis. Stat. 1977-1978, § 50.04(4) (d)[2] and (e)

> "(d) *Suspension of referrals.* The department shall prepare on a monthly basis a list containing the names and addresses of all nursing homes with existing class "A" violations as defined in par. (b) 1 or

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[2] The entire suspension of referrals mechanism was repealed by the Wisconsin Legislature effective March 3, 1982, by Laws of 1981, Chapter 121, § 11.

with 5 or more existing violations of any type, for which a plan of correction has not been timely submitted to the department under par. (c), for which a plan of correction has been disapproved or for which an approved plan of correction has not been carried out. A copy of the monthly list of violators shall be sent to each county welfare director and each s. 51.42 or 51.437 board director in the county in which each nursing home listed is located. The department shall notify each nursing home placed on the list of such placement at least 10 days prior to issuance of the list. No nursing home may be placed on the list unless a hearing has been held under par. (3) and a final determination has been made by the department or the time for requesting a hearing has passed and no request has been made. . . .

2. No county social services department or board under s. 51.42 or 51.437 may refer persons to nursing homes on the list prepared under this paragraph. . . .

(e) *Hearings.* 1. If a nursing home desires to contest any department action under this subsection, including rejection and imposition of a plan of correction, or suspension of referrals or admissions, it shall send a written request for a hearing under s. 227.07 to the department within 10 days of receipt of notice of the contested action. All agency action under this subsection arising out of a violation or rejection and imposition of a plan of correction shall be the subject of a single hearing. The department shall commence the hearing within 30 days of the request for hearing, within 30 days of the department's acceptance of a nursing home's plan of correction or within 30 days of the department's imposition of a plan of correction, whichever is later."

Wis. Stat., 1983-1984, § 50.04(4) (e)[3]

"(e) *Hearings.* 1. If a nursing home desires to contest any department action under this subsection, in-

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[3] Jurisdiction over nursing home appeals was transferred from the department to a separate independent hearing agency by Laws of 1981, Chapter 121, § 2, effective March 3, 1982.

cluding rejection and imposition of a plan of correction, it shall send a written request for a hearing under s. 227.07 to the division of hearings and appeals created under s. 15.103(1) within 120 days of receipt of notice of the contested action . . . ."

## STATEMENT OF THE CASE

The petitioner, Cameo Convalescent Center, Inc. (Cameo), is a family held corporation in Milwaukee, Wisconsin, whose primary business is operating a licensed nursing home. Nursing homes are subject to extensive federal and state regulation and, in Wisconsin, the Wisconsin Department of Health and Social Services (Department) monitors the compliance of nursing homes with these federal and state regulations. This action arose by virtue of certain enforcement actions taken by the Department in 1978 and 1979.

The respondent, Terry Willkom (Willkom), during the time pertinent to this action, was the Deputy Secretary of the Department. (App. 12A) Willkom was not an attorney and his usual job functions did not involve decisions regarding whether or not enforcement actions against nursing homes should be initiated or continued. (App. 39A-40A) Official authority to withdraw enforcement actions that were underway rested with Mr. Fiss, the Bureau Director, or with the Administrator of the Division of Health. (App. 38A)

The action sought declaratory and equitable relief, as well as monetary damages, under the United States

Constitution, and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (App. 26A-36A) The complaint alleges that Willkom individually, or through employees of the Department, deprived Cameo of its property interests without due process of law and violated Cameo's rights to free speech and to petition the government for a redress of grievances.

The case arises out of many of the same factual circumstances, though not the same issues, which were previously submitted to this Court in *Cameo Convalescent Center v. Senn,* 738 F.2d 836 (7th Cir. 1984), cert. denied in *Percy v. Cameo Convalescent Center,* 84-505 and *Cameo Convalescent Center v. Senn,* 84-680. (R. 11)[4]

The complaint alleges that the continued pursuit of allegations, known to be false, against Cameo, and the resulting placement of Cameo on the suspension of referrals list (SORL) based on those allegations, was done in retaliation for exercise of its First and Fourteenth Amendment rights and deprived Cameo of a protected property interest without due process of law. Willkom is specifically alleged to have participated in these deprivations through supervisory action and by influencing one of the lawyers to continue administrative proceedings after being informed that the allegations were without merit. (App. 29A, 31A)

On September 19, 1978, Darla Senn, a nurse surveyor within the Department issued 31 Notices of Violation (NOV's) to Cameo. The issuance of these NOV's by Senn was without probable cause and Senn was motivated by

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[4] Cameo learned of Willkom's involvement in the administrative proceedings during the discovery phase of the initial action. Its motion to add Willkom as a defendant to that action was denied by the trial court.

a desire to punish Cameo for the exercise of its First and Fourteenth Amendment rights. (App. 17A) Willkom was aware that Senn had a previous history of issuing NOV's that lacked factual or legal support. (R. 16; Ex. 3)

Cameo timely petitioned for a hearing on both the NOV's and the subsequently imposed plans of correction (POC's). Those appeals were pending before the Department at the time of the acts by Willkom which underlie this petition. Cameo had not, however, been provided with a hearing on its appeal of the NOV's, though the applicable statute provided for a hearing in 30 days. (App. 14A)

On March 21, 1979, Cameo received a notice from the Department that it would be placed on the SORL as a result of certain of the NOV's issued by Senn in September of 1978. Placement on this list precluded any county social service agency from referring patients to Cameo. Cameo was given ten days from the receipt of that notice to appeal placement on the list. The statute provided that Cameo could not actually be placed on the list unless it failed to timely appeal or the appeal had been lost by Cameo. (App. 15A)

On March 26, 1979, shortly after the notice of placement had been sent to Cameo, Willkom, together with Burton Wagner, the executive assistant to the Secretary, and Thomas Van de Grift, one of the agency lawyers handling the Cameo case, attended an out-of-town meeting together. Burton Wagner functioned as the supervisor of the Department's hearing examiners who heard appeals filed by nursing homes. These three individuals, on the

trip back, discussed the NOV's which had been issued to Cameo by Senn. (App. 16A, 37A-38A) It is this discussion which underlies some of Cameo's claims, as well as the protection of prosecutorial immunity sought by Willkom and granted by the courts below.

This discussion centered around the general enforcement policies towards nursing homes. Cameo was apparently discussed as an example during the course of that discussion. Willkom was told by the lawyer assigned to handle the Cameo case that a number of the NOV's issued by Senn to Cameo were unsupportable. (App. 37A, 41A) These three individuals then discussed whether the Department should continue to pursue these NOV's. Willkom suggested that Van de Grift should nevertheless proceed to hearing on the unsupportable NOV's. (App. 41A) Wagner, the supervisor of the hearing examiners, and the Secretary's assistant in reviewing those decisions, supported the position of Willkom. (App. 42A) Political pressure from the legislature influenced Willkom's position. (App. 42A) The enforcement action against Cameo, in fact, continued, and escalated.

Cameo filed a timely appeal of its notification of its placement on the SORL, on March 30, 1979, just four days after this conversation. Despite Cameo's timely appeal, the list was published and disseminated to more than 500 interested parties on April 4, 1979, with Cameo's name included. This occurred only a little more than a week after the conversation among Willkom, Wagner and the lawyer handling Cameo's case. (R. 16)

For purposes of the motion for summary judgment, Willkom admitted that his involvement in continuing to pursue the NOV's was the proximate cause of Cameo be-

ing placed on the SORL. (R. 8 and 9) The district court, in deciding the case, assumed both the causal connection between the continuation of the enforcement action and Cameo's placement on the list and that Willkom knew, or should have known, that such continuation would result in Cameo's placement on the list. (App. 17A)

On March 27, 1979, the day after this conversation, Cameo had appealed a previous hearing examiner's decision, denying its motion to dismiss for lack of a timely hearing, to the Department Secretary. After Cameo had already been placed on the list, and the list had been mailed out, the Secretary denied this appeal claiming that final decision-making authority had been delegated to the hearing examiner. That delegation, however, did not occur until after the appeal was denied and was then postdated to the previous January, when the examiner had made the ruling which Cameo sought to appeal from. (App. 14A, 44A-45A)

Almost all of the outstanding NOV's issued to Cameo were subsequently dismissed. (R. 16) A subsequent nursing home survey of Cameo in 1979 resulted in a number of new NOV's. Most of these NOV's were then dismissed by a hearing examiner as without merit. Secretary of the Department, Donald Percy, Willkom's immediate supervisor, overruled the hearing examiner's dismissal of some of these NOV's. (App. 17A-18A)

The district court granted Willkom's motion for summary judgment, dismissing Cameo's complaint, on two grounds: (1) that Willkom had established that, with the exception of his involvement in the decision to maintain the action, he had insufficient involvement to warrant liability; and, (2) that his involvement in the decision to

proceed was protected by absolute prosecutorial immunity. (App. 18A-25A) The circuit court below affirmed, but based its decision solely on prosecutorial immunity, holding that prosecutorial immunity was a complete bar to the plaintiff's claims. (App. 8A)

## REASONS FOR GRANTING THE PETITION

The factors which this Court will normally consider in determining whether to grant a petition for certiorari are contained in Supreme Court Rule 17. That Rule provides that certiorari is appropriate where the petition seeks to review a decision of a federal court of appeals which is in conflict with the decision of other courts of appeals on the same matter and where a federal court of appeals has decided an important question of federal law which has not previously been, but should be, finally settled by this Court. Review is also appropriate where a lower court has decided a federal question in a manner inconsistent with previous decisions of this Court.

This petition should be granted, under those standards, on three points. Two of those points are issues left open by this Court's decision in *Butz v. Economou,* 438 U.S. 478 (1978) and not thereafter addressed or clarified by this Court. Those issues focus on the questions of the nature of governmental duties, and the degree of checks on agency zeal, which must be established by an agency official seeking the protection of prosecutorial immunity in an action based on 42 U.S.C. §1983. The third issue is based on the trial court's dismissal, and the circuit court's affirmance of that dismissal, of the

plaintiff's entire case, rather than just the plaintiff's claims for damages, under the doctrine of prosecutorial immunity.

## I. THE SCOPE OF PROSECUTORIAL IMMUNITY FROM 42 U.S.C. § 1983 CLAIMS IN A STATE AGENCY SETTING IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE DECIDED BY THIS COURT.

This Court first extended prosecutorial immunity to claims under 42 U.S.C. §1983 in *Imbler v. Pachtman,* 424 U.S. 409 (1976). At issue in that case was whether certain claims against state criminal prosecutors made under §1983, as well as those made under state law, were barred by the doctrine of prosecutorial immunity. This Court, after reviewing both the history and the policies of prosecutorial immunity, concluded that Congress had intended, in adopting the Civil Rights Act, to retain the common law prosecutorial immunities which existed at the time the statute was adopted.

The Court applied a balancing test and determined that public policy dictated that, in certain circumstances, society's interests in aggressive and fair law enforcement must take precedence over, otherwise valid, individual constitutional claims. It rested its decision, in large measure, both on the nature of the job of a state prosecutor and on the other remedies which were available to insure that a state prosecutor did not act outside of the bounds of law. The Court specifically noted that:

> "Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims

> of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor *responsible annually for hundreds of indictments and trials." Imbler,* 424 U.S. at pp. 425-426. (Emphasis added)

One of the other factors upon which the Court relied was the fact that state prosecutors, as lawyers, are subject to professional discipline and this would also serve as a deterrent to constitutional deprivations, noting that, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." 424 U.S. at p. 429.

*Butz* involved an action against federal officials in the Department of Agriculture. The plaintiffs there had contended that these officials had instituted unauthorized proceedings against them which had violated plaintiffs' constitutional rights. Those officials included the Secretary and Assistant Secretary of Agriculture, the Judicial Officer and Chief Hearing Examiner who heard the case, several officials in the Commodity Exchange Authority, the Agriculture Department attorney who had prosecuted the enforcement proceeding, and several of the auditors who had investigated the plaintiffs or who were witnesses against the plaintiffs in the trial.

The district court had dismissed the complaint against all of the individual defendants, holding that they were entitled to absolute immunity because all of the actions alleged were within the scope of their authority and were discretionary acts, relying on the plurality opinion of this Court in *Barr v. Matteo,* 360 U.S. 564 (1959). The court

of appeals reversed, finding instead that all of the officials were entitled to only qualified, or limited, immunity. On appeal, this Court vacated and remanded the case for further factual findings.

The *Butz* court set forth certain general principles to follow in determining whether qualified or absolute immunity applied. It concluded that the district court's original decision finding all of the defendants absolutely immune was incorrect because:

> "The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. . . . It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. . . . In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." 438 U.S. at pp. 505-506.

Thus, the *Butz* court clearly recognized that an individual is not accorded absolute immunity merely because he occupies a position of power or a policy-making position. Absolute immunity is to be accorded only in those situations where it is essential to the public welfare. "[F]ederal officials who seek absolute exemption from personal liability for unconstitutional conduct *must bear the burden of showing that public policy requires an exemption of that scope.*" *Butz* at p. 506. (Emphasis added.)

In *Butz*, this Court did extend the immunities previously accorded to state prosecutors and judges to those federal agency personnel "performing certain functions analogous to those of a prosecutor," 438 U.S. at p. 515, after concluding that administrative proceedings under the federal Administrative Procedure Act (APA) shared enough "of the characteristics of the judicial process." In reaching this conclusion, the Court relied heavily on the degree of independence accorded to the Administrative Law Judges (ALJ's) under the APA. See, for example, the history of the development of the ALJ's and their independence in *Nash v. Califano*, 613 F.2d 10, 14-15 (2nd Cir. 1980).

After *Butz*, there can be little doubt that a federal agency lawyer, who is responsible for initiating administrative actions and presenting evidence at a federal administrative hearing governed by the APA, would be absolutely immune from a suit for damages for claims based on his decision to initiate the action or decisions relating to the presenting of evidence in the case. For, in reaching its decision, the Court took special exception to the fact that the court of appeals had not extended judicial and prosecutorial immunity to the chief hearing examiner and the agency lawyer. 438 U.S. at p. 511. It might also be concluded that a state agency lawyer, performing essentially the same functions, might similarly qualify, provided the fact finder shared the independence of an ALJ. See, for example, *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984), appeal pending, sub nom. *Demery v. Rowland*, Case No. 84-421.

In subsequent cases, this Court has refused to extend absolute immunity to public defenders, in *Tower v. Glover*,

467 U.S. —, 81 L. Ed. 2d 758 (1984), and to those who conspire with judicial officers in *Dennis v. Sparks*, 449 U.S. 24 (1980). The Court did, however, extend immunity to police officers for their testimony in state criminal prosecutions, *Briscoe v. Lahue*, — U.S. —, 75 L. Ed. 2d 96 (1983).

The *Butz* Court did not, however, express a viewpoint on the applicability of prosecutorial immunity to any of the other agency officials named as defendants in that case. This case now presents this question, as well as the question of whether the APA analogy also extends to state proceedings that do not contain all of the APA safeguards.

This Court has not, therefore, previously addressed two of the questions presented by this petition. Does prosecutorial immunity protect a nonlawyer agency official whose normal job duties do not involve decisions relating to litigation, but who may have become involved in influencing a decision to initiate or maintain agency action in a given case? Does prosecutorial immunity apply where the administrative process does not guarantee a fact finder with the degree of independence of an ALJ?

If reference to the listings for *Butz* and *Imbler* in Shepards Supreme Court Citations is any indication, these are issues whose frequency of litigation may be surpassed only by claims for attorneys' fees. See, for example, *Pulliam v. Allen*, — U.S. —, 80 L. Ed. 2d 565, 588 (1984), Justice Powell dissenting.

### A. Public Policy Requires That The Prosecutorial Immunity Questions Be Resolved.

Given the purpose underlying prosecutorial immunity, the protection of qualified persons from expensive and

repetitive litigation, such immunity can only do the job intended if its applicability, or lack of applicability, to a case is clear. Otherwise, the would-be "prosecutor" will be forced to spend more time and money litigating the complex, and as yet unresolved, immunity questions than he would in defending against the underlying frivolous suits from which prosecutorial immunity is designed to protect him. This Court has previously recognized that, "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading." *Butz,* at p. 507.

A plaintiff's lawyer is duty bound to assert a client's claim which is honestly debatable, and is not inclined to withhold civil rights claims in the absence of clearly defined immunity. Similarly, when the availability of an absolute defense is arguable, meritorious claims are rendered far more complex and expensive to the injured party. The defendant in such a situation, fearful of losing on the merits, will resort to every arguable defense in an effort to avoid liability. A vaguely defined immunity, therefore, does not reduce suits. It simply makes them more complex by adding an additional issue.

The Court recognized this very problem, as it applied to qualified immunity questions, and changed to a clearer and more objective standard in *Harlow v. Fitzgerald,* 457 U.S. 800, 813-814 (1982).

The present case provides an excellent vehicle for the Court to add flesh to the skeleton of the parameters of the prosecutorial immunity defense outlined in *Butz.* Willkom represents the typical state officer who often lays claim to a prosecutorial immunity defense in this grey area.

It was not part of his normal duties to make, or even to influence, decisions concerning the initiation or maintenance of legal proceedings. He was not a lawyer or otherwise involved in the litigation. He was, however, in his own words, "involved in influencing"[5] the decision to maintain the administrative proceedings at issue here. (App. 40A)

The evidence indicates that Willkom, the Deputy Secretary of the Department, outside of the normal judicial process, and during a casual conversation in an automobile with the attorney involved in the case, influenced that attorney to continue an administrative proceeding against Cameo despite knowledge that the underlying charges were meritless. Cameo was consequently placed on a suspension of referrals list. There is also evidence that this influence was for political purposes. Thus, this is not one of those "insubstantial lawsuits" which would not otherwise "survive a motion to dismiss." *Butz*, at pp. 507-508.

### B. Willkom Was Not Functioning As A Prosecutor In The Traditional Sense.

In the absence of prosecutorial immunity, Willkom's actions would not have been protected by absolute immunity. Following the decision in *Butz*, this Court was faced with the question of the burden which must be met by a defendant in order to establish that he qualified for such protection when he did not fall within any of the

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[5] The circuit court stated that Willkom "ordered" the continuation of the case. (App. 3A) The district court found that Willkom "suggested" that the case be pursued. (App. 16A Willkom, himself, however, when asked if he "participated" in the decision, responded that he was "involved in influencing the decision." (App. 40A)

specifically designated categories. See, the companion cases of *Nixon v. Fitzgerald,* 457 U.S. 731 (1982) and *Harlow v. Fitzgerald, supra.*

*Nixon* and *Harlow* both involved an action by a civilian employee of the Department of the Air Force seeking civil damages for a conspiracy to violate his constitutional and statutory rights and to effect his unlawful discharge from his employment with the Air Force. The plaintiff contended that he was discharged because of testimony which he made concerning cost overruns in the Defense Department. Both groups of defendants, in *Nixon,* the former President of the United States, and in *Harlow,* two of his presidential aides, invoked the defense of absolute immunity.

On review of the district court's decision, which had held that neither the President or his aides were entitled to absolute immunity, the Supreme Court reversed on the question of presidential absolute immunity, but affirmed the district court's finding of no absolute immunity with respect to his aides. In reaching that decision, the Court set forth a specific evidentiary standard which must be met in order to qualify an official for absolute immunity. The Court established that standard as follows:

> "In order to establish entitlement to absolute immunity a Presidential aide must first show that *the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.*" 73 L. Ed. 2d at p. 407. (Emphasis added.)

In short, what the Court held was that, in order to qualify for absolute immunity, an official must show that

his job duties require such immunity and that he was acting in the scope of the job. Willkom has not introduced evidence to establish that either of those two tests have been met.

Willkom was clearly not entitled to absolute immunity solely because he was a high government official who had the inherent ability to ultimately control "prosecutions." For, as the Supreme Court specifically indicated in *Harlow,*

> "In *Butz v. Economou, supra,* the Secretary of Agriculture—a Cabinet official directly accountable to the President—asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim." 73 L. Ed. 2d at p. 404.

The Court in *Butz,* in determining that there may be an absolute immunity for prosecutors under the Civil Rights Act, leaned heavily on its prior decision in *Imbler v. Pachtman, supra.* In *Imbler,* an action had been brought against a prosecuting attorney in a criminal case for knowingly presenting false evidence and suppressing material evidence in a criminal trial. The Court held that these actions of the prosecutor were absolutely immune. The Supreme Court specifically limited its holding to two types of prosecutorial action, the initial decision to initiate criminal prosecutions and the actions in conjunction with the presentation of evidence at the trial itself. *Imbler,* 424 at pp. 430-431.

*Imbler,* however, was based upon a number of factors that are not present in this case. Pachtman, the defendant in that case, was a district attorney and lawyer, subject to peer review and discipline if he overstepped his bounds. 424 U.S. at p. 429. Willkom is not. There are therefore

no constraints on his conduct not shared by any other government official acting under color of state law.

Pachtman, as a state prosecutor, was responsible for a myriad of decisions relating to the initiation and maintaining of proceedings, and hence would be particularly vulnerable to a multiplicity of suits. 424 U.S. at pp. 425-426. The authority to decide such cases here, however, rested with the Bureau Director and Division Administrator. There is no evidence that Willkom ever participated in other similar decisions. Indeed, the district court clearly inferred that he did not:

> "Willkom did not . . . in the ordinary course of his duties review any actions of the Bureau of Quality Compliance with regard to nursing homes unless receivership or closing of a facility was recommended by the Division of Health." App. 13A.

The Court of Appeals for the District of Columbia has recognized that the resolution of the prosecutorial immunity question depends upon the frequency of the decisionmaking and on the safeguards present to reduce abuse. *Gray v. Bell,* 712 F.2d 490 (D.C. Cir. 1980). Thus, the frequency of making decisions likely to prompt colorable constitutional claims, found determinative in *Imbler,* was not present here.

The Court in *Imbler* also found that absolute immunity should be accorded prosecutors because they are part of the judicial process and exercise discretionary judgment on the basis of evidence presented to them in an individual case. 424 U.S. at 423, n. 20. Willkom never reviewed the individual facts of the Cameo case to determine "probable cause." The district court found that he had no participation at all in the case prior to his indica-

tion to Van de Grift that the case should proceed. (App. 19A) The district court also found that he advised that the case should continue for political reasons and without regard to the individual facts. (App. 16A-17A) Indeed, Willkom's actions were more akin to the actions of a "client,"[6] deciding to proceed after being told by his lawyer that his lawsuit had little chance of success, than to those of a prosecutor, attempting to make a determination on whether justice would best be served by submitting the case to trial.

We contend that Willkom's ad hoc influence of the lawyer to continue an existing action does not qualify him for prosecutorial immunity in the same way that it would qualify the lawyer for such immunity if he made the decision to proceed himself. If the two reached an agreement to proceed, the most that has been shown is a conspiracy between them. In such a case, only the lawyer's acts, if anyone's, would be immune. This specific question was previously addressed and answered by this Court in *Dennis v. Sparks*, 449 U.S. 24 (1980).

In *Dennis*, after a state court injunction was dissolved by the appellate court as having been illegally issued, an action was brought by the enjoined party against the judge and the opposing parties who had obtained the injunction, claiming that their injunction had been corruptly issued as

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[6] The district court and court of appeals drew an analogy between Willkom's actions and those of a supervising prosecutor instructing a subordinate to proceed despite the subordinate's doubts about the case. Under the facts presented here, we feel that the "client" analogy is much closer. Even Van de Grift, in referring to the persons having authority to terminate the litigation, used the term "clients." (App. 38A)

a result of a conspiracy. This Court recognized that the judges of the trial court was protected by judicial immunity, but held that the remaining parties, though they may have acted in concert with the judge, were not immune. In reaching that conclusion, the Court stated that:

> "Petitioner nevertheless insists that unless he is held to have an immunity derived from that of the judge, the latter's official immunity will be seriously eroded.
>
> • • • •
>
> In terms of undermining a judge's independence and his judicial performance, the concern that his conduct will be examined in a collateral proceeding against those with whom he allegedly conspired, a proceeding in which he cannot be held liable for damages and which he need not defend, is not of the same order of magnitude as the prospects of being a defendant in a damages action from complaint to verdict with the attendant possibility of being held liable for damages if the fact finder mistakenly upholds the charge of malice or of a corrupt conspiracy with others." 449 U.S. at pp. 29-31.

This Court has also held that public officers are subject to the same immunity standards as individual citizens when testifying in judicial proceedings. *Briscoe v. Lahue, supra.* Since all judicially based immunities derive from the common goal of "protecting the judicial process," *Imbler,* 424 U.S. at 439, the circuit court's finding that Willkom stands on a different footing when conspiring to continue litigation, than the private conspirator in *Sparks,* is far from clear.

In light of the substantial doubt that Willkom was acting as a prosecutor, as opposed to merely influencing the decision of a prosecutor, review of this decision by

certiorari is clearly appropriate to determine the bounds of prosecutorial immunity.

### C. The Administrative Proceedings Were Not Sufficiently Independent To Qualify For Prosecutorial Immunity Under The Strict Language of Butz.

Assuming arguendo that Willkom was a prosecutor, acting to maintain an administrative proceeding, there are still substantial questions regarding the availability of prosecutorial immunity under *Butz*.

As was made clear in *Butz v. Economou, supra,* prosecutorial immunity is a limited defense to § 1983 actions. It only applies where there is an adjudicatory process which shares the characteristics and safeguards of a judicial proceeding. The Court in *Butz, supra,* specifically emphasized the importance of having an independent fact finder:

> "More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." 483 U.S., at 513.

Under the federal Administrative Procedure Act, administrative law judges are not subject to being rated by the agencies, their pay is not determined by the agencies, and they are not subject to discipline or control by those agencies. *Nash v. Califano, supra.* The Court's decision in *Butz* was a recognition of the value of that independence.

Where the adjudicatory process at issue has failed to measure up to the safeguard of an independent fact

finder enumerated in *Butz, supra,* absolute immunity has been denied. In fact, that immunity was denied to hearing examiners in the same department for which Willkom served as Deputy Secretary because of the lack of independence.

In *Harris v. Powers,* 520 F. Supp. 111, 115 (W.D. Wis. 1981), the district court for the Western District of Wisconsin concluded that prosecutorial immunity could not apply to a Wisconsin Department of Health and Social Services hearing examiner's acts because nothing preserved the hearing examiner's independence.

> "Although the second decision was made in the context of an adversarial proceeding, it was made in the absence of a formal structure preserving the examiner's independence." 520 F. Supp. at p. 116.

Similar results have been obtained in *Meyer v. Niles Township, Illinois,* 477 F. Supp. 357, 364 (N.D. Ill. 1979) and *Williams v. Trimble,* 527 F. Supp. 910 (S.D. N.Y. 1981).

The courts below concluded that despite Butz' reliance on the APA in extending absolute immunities to administrative officials, independence and formality of procedures need not be shown. All that need be shown, in their view, is the availability of judicial review. (App. 8A, 24A)

This view is not, however, shared by all courts who have addressed this issue, *Williams v. City of Montgomery,* 742 F.2d 586, 589 (11th Cir. 1984) and *Jihaad v. O'Brien,* 645 F.2d 556 (6th Cir. 1981). In *Lentsch v. Marshall,* 741 F.2d 301 (10th Cir. 1984), a case relating to witness immunity, the Court did find absolute immunity to apply to witness testimony in an administrative pro-

ceeding. But it based its decision on the similarity between the proceedings before the Civil Service Commission there, and the proceedings under the federal administrative procedure act.

In *Williams,* members of a city-county personnel board sought absolute judicial immunity under *Butz.* The Court reviewed the board's procedures, including its lack of independence and the fact that they were subject to political influence, and rejected that defense, stating:

> "In *Butz,* the Supreme Court held that federal hearing examiners are absolutely immune. . . . The Court based its decision on the similarity between the federal agency process and judicial process. The board members contend . . . that they are also entitled to absolute immunity. This contention lacks merit." 742 F.2d at p. 589.

Indeed, the court below has not itself applied the judicial immunity doctrine consistently as it relates to the independent forum question. See, *Redding v. Fairman,* 717 F.2d 1105 (7th Cir. 1983) and *Saxner v. Benson,* 727 F.2d 669 (7th Cir. 1984), appeal pending, sub nom. *Saxner v. Cleavinger,* No. 84-732.

*Saxner* was a decision in which all three judges on the panel expressed different views on what was required in order to establish judicial immunity. At issue was whether prison disciplinary committee members should be accorded judicial immunity for their decisions. A majority of the Court held that they should not be accorded such immunity. The three separate opinions, however, express the confusion which prevails on this question in the absence of further guidance by this Court.

Judge Cudahy, in his concurrence, states the issue most succinctly:

> "Quasi-judicial functions are performed by many executive officials, and only in the most extraordinary cases are they absolutely immune from damage liability. Whether an official's function and position in government is far enough removed from the school board members in *Wood* [v. *Strickland,* 420 U.S. 308 (1975)] to justify absolute immunity under *Butz* may be the key question in the case. I suspect that the Supreme Court went as far as it is willing to go with quasi-judicial immunity in *Butz* itself" 727 F.2d at p. 674, n. 2.

One of the defects precluding immunity found by Judge Cudahy was the fact that, while the *Butz* hearing officers were not supervised by an employer interested in the case, the disciplinary committee members were "supervisors and fellow employees" of the people who bring the charges.

The issues which so strongly divided the circuit court in *Saxner,* are also present in this case. The adjudicatory process in this case also lacked an independent decisionmaker. The ultimate decisionmaker, and supervisor, with respect to both the prosecution and adjudication of this case was the same person, Secretary Percy. (App. 13A-14A)[7] Both the people who brought the charge, and the hearing examiners who heard them, reported to Percy.

Willkom, who influenced the prosecution policy, discussed continuation of the Cameo case with Burton Wag-

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[7] The district court found that the fact that Percy did not delegate decisionmaking authority to the hearing examiner until after the facts at issue here had already occurred reflected on the independence of the examiner.

ner, the individual Wagner, the individual responsible for the oversight of the hearing examiners, at the same time he was discussing it with Van de Grift, the attorney in charge. (App. 37A, 43A) Wagner agreed with Willkom's position.

The Secretary's authority to control decisions of the hearing examiners was not hypothetical. When the NOV's which were issued to Cameo in 1979 finally went to hearing, Percy actually exercised his authority and overruled the hearing examiner's decision dismissing certain NOV's. (R. 16, Ex. 18)[8] This is clear evidence that the functions of prosecution and adjudication were not sufficiently independent so as to meet the *Butz* test.[9]

## II. THE COURT'S ORDER BELOW, DISMISSING THE PETITIONER'S CLAIMS IN THEIR ENTIRETY, IS IN CONFLICT WITH A RECENT DECISION OF THIS COURT.

Assuming arguendo that the courts below were correct in dismissing the petitioner's claims for damages as barred by the doctrine of prosecutorial immunity, the decision to dismiss the petitioner's claims for declaratory and injunctive relief was clearly improper in light of this

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[8] The Wisconsin Legislature has subsequently created an independent hearing agency for this type of case.

[9] The district court also relied on its perception, at page 16 of its opinion, that the procedures must have been impartial since Cameo prevailed. In fact, Cameo did not prevail through an adjudication. The 1978 NOV's were withdrawn by stipulation in July of 1980, after substantial litigation. Cameo did prevail before the hearing examiner with respect to the 1979 NOV's, however. But, that decision was then modified in favor of the "prosecution" by Secretary Percy, the supervisor of Willkom.

Court's recent decision in *Pulliam v. Allen*, — U.S. —, 80 L.Ed.2d 565 (1984).

*Pulliam*, decided after both the district court's decision below and the briefing had been completed before the circuit court, limited the scope of prosecutorial immunity to claims for monetary damages only, stating that:

> "We never have had a rule of absolute judicial immunity for prospective relief and there is no evidence that the absence of that immunity has had a chilling effect on judicial independence. . . .
>
> For the most part, injunctive relief against a judge raises concerns different from those addressed by the protection of judges from damages awards." 80 L.Ed. 2d at p. 576.

In the instant case, the petitioner brought its claims not only for damages, but also for declaratory and injunctive relief. The courts below, however, did not distinguish between the two types of claims, and instead, based upon prosecutorial immunity, dismissed the plaintiff's case in its entirety. Because of the conflict between this Court's recent decision in *Pulliam*, and the actions of the courts below, this Court should grant certiorari to modify the decisions below, reinstating petitioner's claims for injunctive and declaratory relief.

## CONCLUSION

For all of the reasons stated, this Court should grant this petition for a writ of certiorari, and hear the case on its merits.

Dated this 21st day of March, 1985.

Respectfully submitted,

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# APPENDIX

## APPENDIX

## TABLE OF CONTENTS


| | Page |
|---|---|
| Unpublished Order, United States Court of Appeals, Seventh Circuit, December 21, 1984 | 1A |
| Judgment—Oral Argument, United States Court of Appeals, Seventh Circuit, December 21, 1984 | 9A |
| Judgment On Decision By The Court, U.S. District Court, October 24, 1983 | 10A |
| Memorandum and Order, U.S. District Court, October 20, 1983 | 11A |
| Complaint, April 21, 1983 | 26A |
| Testimony of Thomas Van de Grift, Summary Judgment, Exhibit 14 | 37A |
| Testimony of Terry Willkom, Summary Judgment, Exhibit 1 | 39A |
| Testimony of Terry Willkom, Summary Judgment, Exhibit 16 | 40A |
| Testimony of Terry Willkom, Summary Judgment, Exhibit 15 | 41A |
| Affidavit of Terry Willkom, R. 11 | 42A |
| Testimony of Donald E. Percy, Summary Judgment, Exhibit 17 | 43A |
| Correspondence from Secretary Donald E. Percy to Robert M. Hesslink, Jr., April 11, 1979 with attached Administrative Order Re Delegation of Authority to Hearing Examiners for Hearings Involving Cameo Convalescent Center, Inc. | 44A |

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

December 21, 1984

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

CAMEO CONVALESCENT CENTER, INC.,

Plaintiff-Appellant,

vs.

No. 83-3137

TERRY WILLKOM,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.

No. 83 C 385-S

John C. Shabaz, Judge.

ORDER

Plaintiff Cameo Convalescent Center, Inc. (Cameo), a nursing home subject to regulation by the State of Wisconsin Department of Health and Social Services (the Department), appeals the district court's grant of defendant Deputy Secretary Terry Willkom's motion for summary judgment. Cameo argues that summary judg-

ment on its complaint regarding malicious prosecution was inappropriate because Willkom is liable under 42 U.S.C. § 1983 (1982 ed.) for his supervisory action in the Department's alleged malicious prosecution of Cameo, and because there was insufficient evidence to support a finding that Willkom qualified for prosecutorial immunity. We affirm the district court's dismissal.

In September, 1978, Darla Senn, a nurse surveyor with the Bureau of Quality Compliance, an agency within the State of Wisconsin Division of Health, issued thirty-one Notices of Violation (NOVs) to Cameo as a result of a survey Senn conducted of Cameo. On October 15, 1978, Plans of Correction (POCs) were imposed on Cameo. Cameo did not implement the POCs and was placed on the Suspension of Referrals (SOR) list without a hearing in March, 1979. Placement on the SOR list prevented Cameo from accepting patients referred by counties. The SOR list was disseminated to interested parties in April, 1979. On April 22, 1983, Cameo commenced an action in the district court under 42 U.S.C. § 1983, alleging that the issuance of the thirty-one NOVs by Darla Senn in September 1978 was without probable cause and that Senn was motivated by a desire to punish Cameo for the exercise of its first and fourteenth amendment rights. Upon consideration of the complaint and other documents, the district court granted defendant Willkom's motion for summary judgment on the grounds of prosecutorial immunity and lack of supervisory liability.

At all times pertinent to this action, Willkom was Deputy Secretary of the Department, worked primarily with the Secretary to establish office policy, and had general supervisory authority over the Division of Health

and its Bureau of Quality Compliance. Before September, 1978, Willkom had not been involved in the day to day decisions regarding when or by whom nursing homes would be inspected nor was he involved in decisions to issue NOVs, or POCs, order a hearing related to these matters or order a placement on the SOR list. Willkom often became involved, however, in decisions regarding highly publicized cases.

Willkom first became involved with this case when on March 26, 1979, prosecuting attorney Tom Van De Grift advised Willkom that the September, 1978 Senn NOVs were legally insupportable. Despite Van de Grift's comments, Willkom ordered that the Cameo NOVs be pursued through the administrative hearing process. The Cameo case was a publicized case; there is evidence that political pressure from the legislature may have influenced Willkom's decision. Although the evidence indicated that during this time Willkom knew that some surveyors had a previous history of issuing notices of violation that lacked factual or legal support, there was no evidence establishing that Willkom had any particular knowledge of Senn's reliability. In July, 1980, Willkom, as Acting Administrator of the Division of Health, signed a settlement agreement with Cameo which discussed almost all of the then outstanding NOVs against Cameo. Other NOVs were filed in the interim against Cameo. These NOVs are still unresolved and are not a part of this cause of action.

Willkom moved for summary judgment in the district court, alleging that he had no supervisory liability for Senn and that he was protected from liability by prosecutorial immunity. The district court granted Willkom's

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motion, finding him immune and not subject to supervisory liability under section 1983.

In reviewing a grant of summary judgment, it must be shown that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. *Progress Development Corporation v. Mitchell,* 286 F.2d 222 (7th Cir. 1961). The party moving for summary judgment has the burden of establishing the non-existence of any genuine issue. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970); *Janowick v. City of South Bend,* No. 84-1321 (7th Cir. Dec. 6, 1984), slip op. at 4; *Cedillo v. Int'l Ass'n of Bridge & Structural Iron Workers,* 603 F.2d 7 (7th Cir. 1979). In addition, where the motivation of the parties is a matter in dispute, the movant's burden of establishing the absence of a material fact is a heavier one. *Tankersley v. Albright,* 514 F.2d 956 (7th Cir. 1975).

We must determine here, therefore, whether any material issue existed on Willkom's claim of immunity. The Supreme Court in *Butz v. Economou,* 438 U.S. 478 (1977), set forth the standard that guides our analysis of Willkom's claim of prosecutorial immunity from liability under Section 1983. *Butz* confers absolute immunity on "those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication." *Id.* at 516. *See also Harlow v. Fitzgerald,* 457 U.S. 800 (1982) (Presidential aides, although not protected by a blanket absolute immunity, are protected if they can show that the "functions" of their office at issue required immunity.); *Imbler v. Pachtman,* 424 U.S. 409 (1975).

The Court in *Butz* reasoned that:

> agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to these acts. The decision to initiate administrative proceedings against an individual or a corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought. . . . The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete. . . . [T]here is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. . . . We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harrassment.

This circuit, following *Butz* and *Harlow,* has adopted a "functional" approach to grants of immunity which provides that "[t]he grant of absolute immunity does not depend on the formal description of the official's activities, but rather on the nature of those activities." *Trotter v. Klincar,* No. 83-2168, slip op. at 8 (7th Cir. Nov. 27, 1984). Part of the "functional" description of a quasi-prosecutorial official entitled to immunity is that the official's position contains "sufficient checks on agency zeal." *Butz,* 438 U.S. at 516. Such checks protect a person who becomes the subject of an administrative proceeding.

Plaintiff argues first that Willkom is undeserving of prosecutorial immunity because his duties as Assistant Secretary are not normally prosecutorial, and that Willkom has not therefore met the *Butz* burden of showing

that "public policy requires an [absolute] exemption." *Butz,* 438 U.S. at 506. Plaintiff concedes that Willkom was a "high government official who had the ability to ultimately control prosecutions," but argues that this ultimate control is not enough, citing *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Plaintiff argues further that Willkom has not shown that his office "embraced a function so sensitive as to require a total shield from liability," or that he was "discharging that protected function" when he ordered the attorney, Van de Grift to continue the administrative proceedings regarding Cameo's NOVs. *See Harlow,* 457 U.S. at 812-13.

Finally, Plaintiff argues that the evidence suggests that Willkom was not acting as a prosecutor, as defined by *Imbler,* when he ordered Van de Grift to proceed. Plaintiff argues that instead Willkom, wholly apart from his official status as Deputy Secretary, was attempting to influence a lawyer, Van de Grift, to continue a prosecution that he would not otherwise continue. To give legal weight to this construction of the evidence, plaintiff cites *Dennis v. Sparks,* 449 U.S. 24 (1980) and *Goldschmidt v. Patchett,* 686 F.2d 582 (7th Cir. 1982). In *Dennis,* the Supreme Court found that various parties to a lawsuit alleged to have conspired with the state court judge presiding over the lawsuit did not share the judge's absolute immunity from a suit for the corrupt conspiracy. In *Goldschmidt,* this court held that persons conspiring with a prosecutor to violate the civil rights of others did not share the prosecutor's immunity from a suit for malicious prosecution.

We are not persuaded by plaintiff's arguments. We think that Willkom's duties, as shown by the evidence presented in the district court, are "functionally comparable"

to those of a prosecutor under the *Butz* analysis of prosecutorial duties. *See Trotter,* slip op. at 8. Willkom's decision to continue to prosecute Cameo, even after being advised otherwise, was a prosecutorial decision. Moreover, Willkom is a state official directly involved in the decision to continue to prosecute Cameo, and thus he is dissimilar from the private citizens who were held in both *Dennis* and *Goldschmidt* to be unprotected by the judicial and prosecutorial immunity at issue in those cases. As the district court noted, if Willkom had been a district attorney ordering a subordinate to continue a case despite the subordinate's doubts about the case, Willkom would have been protected by absolute immunity. Willkom's function here is comparable to that of the district attorney, and thus he is absolutely immune from a suit for malicious prosecution under Section 1983.

Plaintiff's final argument relies on the language in *Butz* which he claims confers immunity only for an official if the proceedings at issue provide "sufficient checks on agency zeal," thus providing the subject of those proceedings some remedy for a misdirection of "agency zeal." The plaintiff argues that because abuses by quasi-prosecutors, such as Willkom, are not of record, absolute immunity is inappropriate. The plaintiff also asserts that the process in which Cameo was involved lacked an independent decision-maker and that agency zeal therefore was not sufficiently checked.

We think plaintiff confuses the requirements for prosecutorial immunity with those of judicial immunity. If prosecutorial immunity depended on the recordation and reviewability of prosecutorial decisions, such immunity

would rarely exist, because prosecutorial decisions not to prosecute are inherently unrecorded and unreviewable. Furthermore, defendant argues that to the extent that checks against excessive agency zeal are necessary, Wisconsin statutes provide for judicial review of nursing home hearing decisions. We think this review and right of appeal checks agency zeal by protecting the subjects of those proceedings, such as plaintiff, with sufficient remedial safeguards. *See Reed v. Village of Shorewood,* 704 F.2d 943 (7th Cir. 1983); *Ashbrook v. Hoffman,* 617 F. 2d 474 (7th Cir. 1980).

Because we find that Willkom is absolutely immune from a suit for malicious prosecution for his continuation of the proceedings against Cameo, we do not need to consider whether the district court properly held that the plaintiff had failed to establish Willkom's supervisory liability under Section 1983. Prosecutorial immunity is an absolute defense.

The order of the district court, therefore, finding Secretary Willkom absolutely immune to a suit for malicious prosecution brought under Section 1983 is affirmed.

AFFIRMED.

Unpublished Per Curiam Order

JUDGMENT—ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

December 21, 1984

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

CAMEO CONVALESCENT CENTER, INC.,

Plaintiff-Appellant,

No. 83-3137

vs.

TERRY WILLKOM,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 83 C 385
Judge John C. Shabaz

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the order of this Court entered this date.

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

Civil Action Docket No. 83-C-385-S

CAMEO CONVALESCENT CENTER, INC.,

Plaintiff,

vs.

TERRY WILLKOM, et al.,

Defendant.

JUDGMENT

This action came on for consideration before the court, United States District Judge John C. Shabaz presiding. The issues having been duly considered and a decision having been duly rendered, it is ordered and adjudged that defendant's motion for summary judgment is Granted. Judgment is entered in favor of the defendant with prejudice and costs.

Dated at: Madison, Wisconsin

Date: Oct. 24th, 1983.

/s/ Joseph W. Skupniewitz
Clerk of the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CAMEO CONVALESCENT CENTER, INC., a corporation organized under the laws of the State of Wisconsin,

Plaintiff,

v.

TERRY WILLKOM, individually and in his official capacity as the Deputy Secretary of the Department of Health and Social Services, of the State of Wisconsin,

Defendant.

MEMORANDUM AND ORDER

83-C-385

Before the Court is the motion of the defendant for summary judgment. Plaintiff claims a violation of constitutional rights by virtue of a malicious prosecution and abuse of process on the part of the defendant. Defendant, in his motion, asserts three grounds for granting him summary judgment: First, that plaintiff's complaint attempts to base liability on a *respondeat superior* basis; second, that he is entitled to absolute prosecutorial immunity; and, third, that plaintiff's complaint fails to state a claim for a constitutional violation.

Jurisdiction is based on 28 U.S.C. § 1343 for a violation of 42 U.S.C. § 1983. Venue is proper in this district.

The facts are as follows:

FACTS

1. Plaintiff Cameo Convalescent Center, Inc., a Wisconsin corporation, is a licensed nursing home under the laws of Wisconsin (Cameo).

2. Defendant Terry Willkom (Willkom), during the time pertinent to this action, was Deputy Secretary of the Department of Health and Social Services (Department). From May, 1980, until July, 1981, Willkom was the acting administrator of the Department's Division of Health (Division).

3. On September 19, 1978, Darla Senn, a nurse surveyor within the Bureau of Quality Compliance, an agency within the Division, conducted an annual survey of Cameo. As a result of this survey, she issued 31 Notices of Violation (NOV's).

4. Of the 31 NOV's, 22 were Class C (violations which do not directly threaten the health, safety or welfare of a nursing home resident); 7 were Class B (directly threatening to health or safety, but not life threatening); and 2 were federal deficiencies which were not subject to state licensing laws.

5. Issuance of the Notices of Violation by Senn constituted a determination by the Department that the nursing home was in violation of the rules of the Department.[1]

6. At this time (September, 1978), Willkom had substantial involvement with the Division of Health by virtue of being the person within the office of Secretary of the

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[1] The parties have disputed this fact. Cameo disputes the use of the term "determination." In the context of § 50.04 (4) (a), Wis. Stats. 1977, the Court understands the term to be analogous to a finding of probable cause on the part of the person issuing the NOV. The statutes give a nursing home the right to contest the NOV through a hearing process. Thus, the Court believes that the essence of Cameo's position on this fact is accepted for purposes of the motion before the Court.

Department with expertise in health-related matters. However, Willkom had no direct responsibility for the training of nurse surveyors, nor for the conduct of any specific annual survey. Nor did Willkom have any direct supervisory control over the day-to-day activities of nurse surveyors.[2]

7. With regard to the inspection of Cameo by Senn in September, 1978, Willkom had no knowledge of the inspection either before or immediately after the issuance of the NOV's. Willkom did not review the NOV's issued by Senn, nor did he, in the ordinary course of his duties, review any actions of the Bureau of Quality Compliance with regard to nursing homes unless receivership or closing of a facility had been recommended by the Division of Health.[3]

8. On September 28, 1978, Cameo petitioned for a hearing on the NOV's and for other relief. This request was in accordance with the statutory review framework which included the right to a hearing, the opportunity to present evidence, and the right to appeal adverse rulings

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[2] The first sentence in this paragraph substantially comports with the finding suggested by plaintiff. From this statement of general supervisory responsibility, Cameo attempts to raise an issue of fact as to the specific activities of Willkom. However, the lack of direct responsibility on the part of Willkom is not disputed.

[3] Cameo asserts that Willkom was in a position to know of the annual nursing home inspections, and that he had indirect involvement with the issuance of NOV's to Cameo because of his general supervisory duties. The Court accepts these assertions for the purposes of argument, but must conclude that they in no way raise a material issue of fact with respect to Willkom's knowledge or to the level of supervision which he exercised.

to the Circuit Court with review to the Court of Appeals. Review by the Wisconsin Supreme Court was discretionary with that Court. Court review was not *de novo*. Factual findings were limited to the record presented within the administrative process and agency factual findings were accorded deference.

9. On October 4, 1978, Cameo was advised by the Department that the hearing requested a week earlier would be delayed pending receipt of Cameo's Plans of Correction (POC's). Further, Cameo was denied an extension of time in which to file POC's because, by statute, all POC's not requiring substantial capital outlays had to be submitted within 15 days. Further, by statute, a failure by the nursing home to submit POC's caused the imposition of POC's by the Department. On October 17, 1978, POC's were imposed on Cameo. Cameo appealed this action.

10. In early 1979, Cameo moved that the NOV's be dismissed and the POC's be withdrawn because the Department had failed to convene a hearing within 30 days as required by statute. The motion was denied by the hearing examiner because the 30-day requirement was, according to department policy, directory rather than mandatory. In April, 1973, [sic] Cameo directed a motion to dismiss the proceedings to Secretary Donald Percy, the head of the Department. Percy denied the motion based on his delegation of decision-making authority to the hearing examiner.[4]

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[4] Cameo claims that the delegation was backdated to January 3 although the delegation did not officially occur until April. This appears to be true although the Court does not believe that the fact is material, except to the extent that it raises a question about the impartiality of the hearing examiner.

11. The POC's were imposed without the knowledge or participation of Willkom.

12. In early January, 1979, another nurse surveyor, Jane Preston, conducted a verification visit to Cameo and found that 24 of the 31 NOV's had been corrected, 3 were uncorrected, and 4 others were found to have acceptable progress toward correction.

13. Because of the unimplemented POC's cited after this verification, and because of changing of placement criteria by the Department, Cameo was placed on the Suspension of Referrals (SOR) list in March, 1979. This was the first such list prepared. Cameo appealed its placement on the list and should have been deleted from the list pending appeal. The list was published and disseminated to interested parties in April, 1979, with Cameo on the list.

14. On April 13, 1979, letters retracting Cameo's inclusion on the SOR list were sent out to the recipients of the list.[5]

15. Willkom did not participate in the preparation of the Suspension of Referrals list. Although nursing home regulation matters had become fairly controversial because of the process at issue here (which was newly enacted at that time), there is no evidence that Willkom had any specific duties or responsibilities with respect to preparation of the list. On or about March 26, 1979,

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[5] Cameo asserts that the record is silent on whether the retraction was sent to all recipients of the list. This is true. The record appears to be silent completely on this matter. For purposes of the motion, the Court will assume that some recipients did not receive the retraction.

Willkom attended a meeting in Milwaukee with staff on Quality Compliance issues in order to familiarize himself with the process.[6]

16. On the trip back to Madison after the above mentioned meeting, Willkom was told by an attorney for the Department, Thomas Van de Grift, that several NOV's which had been issued by nurse surveyors to various nursing homes, including Cameo, were legally unsupportable.

17. Willkom told Van de Grift that an internal dispute of significant proportions had grown in the Department between legal and medical personnel. The medical people, including nurse surveyors, were having difficulty relative to the rules of evidentiary hearings while the attorneys appeared to be insensitive to medical observation and medical record documentation. The Department would be trying to bring the two sides together and Willkom suggested it might be a good idea to proceed to hearing on the allegedly unsupportable NOV's in order to provide the nurses with a learning exercise on the problems in the hearing process.

18. Willkom's approach at that time was that, if the citations were made, he felt that the hearing process should be carried through to determine if they were sup-

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[6] Cameo's objections to the findings of fact from which this paragraph is drawn are unsupported. The objections evidence an attempt to draw inferences of specific, direct involvement from undisputed evidence of generalized interest and knowledge of the subject matter. That is, from Willkom's position of power in the Department, Cameo attempts to raise an issue of disputed fact concerning his involvement in the enforcement proceedings against Cameo. Such an inference is offered without any facts in support.

portable. He rejected any notion of dropping the prosecution of the citations in advance because, if the citations were wrong, the hearing process would prove them wrong. There is evidence that political pressure from the legislature influenced his decision in this regard.[7]

19. All actions taken throughout the process by Willkom were done under color of state law. In July, 1980, while Willkom was Acting Administrator of the Division of Health, he signed a settlement agreement with Cameo dismissing almost all of the outstanding NOV's.

20. For purposes of this motion, the Court assumes that the issuance of 31 NOV's by Darla Senn in September, 1978, was without probable cause and that Senn was motivated by a desire to punish Cameo for the exercise of its First and Fourteenth Amendment rights.

21. A subsequent nursing home survey of Cameo in 1979 resulted in a number of new NOV's. Secretary of the Department, Donald Percy, Willkom's immediate su-

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[7] With respect to this paragraph, Cameo asserts that Willkom influenced decisions as to whether particular prosecutions, especially those garnering publicity such as Cameo's, would be pursued or terminated. This is clearly true, but only with respect to the time frame (March-April, 1979), and is evidenced by the facts cited in this paragraph. From this, and from the fact that Willkom received some memos detailing the development of the suspension of referrals list, Cameo attempts to raise an inference that Willkom was responsible for Cameo's placement on the list. From the standpoint of administrative responsibility, the inference is not legitimate. However, the Court is willing to assume a causal connection between the decision to continue prosecution of the NOV's and Cameo's placement on the list, and that Willkom knew or should have known that Cameo's placement on the list would result from his decision.

pervisor, overruled a hearing examiner's dismissal of some of these NOV's.

MEMORANDUM

Defendant contends that, to the extent plaintiff's complaint attempts to make Willkom responsible for the actions of Darla Senn, the complaint bases his liability on the doctrine of *respondeat superior,* which is not available in § 1983 actions. *Adams v. Pate,* 445 F.2d 105 (7th Cir. 1971). Defendant also contends that his decision to continue the prosecution of Cameo, even after being informed that the NOV's were legally unsupportable, is protected by the doctrine of prosecutorial immunity enunciated in *Butz v. Economou,* 438 U.S. 478 (1978).

I. SUPERVISORY LIABILITY

In *Rizzo v. Goode,* 423 U.S. 362 (1976), the Supreme Court held that liability under § 1983 could not be predicated on a "failure to act in the face of a statistical pattern" of misconduct by subordinates. *Id.* at 376. In *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978), this holding was explained as follows:

> [T]he mere right to control (subordinates) without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability.

*Monell,* supra at 694.

No matter how broadly or liberally the facts of this case are read, the extent of defendant Willkom's supervisory activity here cannot be said to have created liability on his part for the activities of the nurse surveyor, Darla

Senn. Only in the most literal sense did Willkom have the "right to control" the nurse surveyors.

The Court can concede to plaintiff the proposition that Willkom's position as Deputy Secretary with special interest and expertise in health related matters might have allowed him to exercise significant control over the day-to-day activities of the staff of the Bureau of Quality Compliance. But it is undisputed that he neither exercised any control over their activities or training, nor had any reason to believe that closer supervision or control were necessary at least until late March of 1979. He was, at least, one step removed from a position where he might be said to have had a duty to supervise the surveyors. And, as it concerns Cameo in particular, the evidence is clear, without any room for contrary inference, that he knew nothing of Cameo or Darla Senn's actions until he decided, in March, 1979, to allow the questionable NOV's to proceed through the administrative process.

It is appropriate to specify precisely what it is that Cameo alleges is Willkom's responsibility. Cameo claims that Darla Senn, maliciously and in order to retaliate against Cameo for the exercise of its First and Fourteenth Amendment rights, issued 31 NOV's against Cameo. Until the decision by Willkom in March, 1979, there is a total absence of any direction or control being exercised by Willkom, and a similar lack of evidence that Willkom knew or should have known of Darla Senn's actions, much less her motivation.

It has been said that supervisory liability should attach:

> Only when "the failure to supervise or the lack of a proper training program was so severe as to reach

> the level of 'gross negligence' or 'deliberate indifference' to the deprivation of the plaintiff's constitutional rights." *Owens v. Haas,* 601 F.2d 1242, 1246 (2nd Cir.), cert. denied, 444 U.S. 980 (1979).

*Starstead v. City of Superior,* 533 F.Supp. 1365, 1370 (W. D.Wis. 1982) (footnote omitted). Recalling *Rizzo,* supra, where a pronounced pattern of racially discriminatory actions on the part of the police department was insufficient to establish liability on the part of the police chief and mayor, the Court must conclude that Cameo presents a case which cannot be considered close. Assuming that Cameo was deprived of constitutional rights, Willkom was neither deliberately indifferent to the deprivation nor grossly negligent because he knew nothing about the case until he made the decision to let the administrative process run its course.

Although it is by no means clear, it may be that Cameo is attempting to assess liability on a separate basis for Willkom's failure to prevent Cameo's placement on the suspension of referrals list. The analysis above is equally applicable to this allegation. There is no factual issue raised regarding his involvement in this particular aspect of the case. To the extent that it can be said that his decision to continue the prosecution of the NOV's *caused* Cameo's placement on the list, the discussion below regarding prosecutorial immunity disposes of the question. As far as Willkom's administrative (as opposed to prosecutorial) responsibilities may have had anything to do with Cameo's placement on the list, the record discloses nothing which overcomes the bar against liability based on a *respondeat superior* theory.

## II. PROSECUTORIAL IMMUNITY

In *Butz v. Economou,* 438 U.S. 478 (1978), the Supreme Court held that, while absolute "official" immunity was unavailable to federal executive agency officials, the doctrine of absolute immunity accorded to judges and prosecutors was available to agency officials whose duties were analogous to those of judges and prosecutors. The Court left no doubt that its analysis was equally applicable to state agecy [sic] officials.

It is undisputed that Willkom's decision to continue the prosecution of Cameo, even after being advised by the attorney prosecuting the case that the NOV's were not supportable, was a prosecutorial decision. Argument by analogy being the normal manner of proceeding on this question, it is appropriate to point out that Willkom's decision was like that of a district attorney who advises a subordinate to continue a criminal prosecution despite the subordinate's doubts about the case. Whether motivated by political considerations (arguably the case here) or by malice, the district attorney would be protected by absolute immunity. *Imbler v. Pachtman,* 424 U.S. 409 (1976). If that were the end of the inquiry regarding agency prosecutors, Willkom should be entitled to immunity as well.

However, that is not the end of the inquiry. Cameo does not resist summary judgment because Willkom's functional role was not that of a prosecutor. Cameo concedes, as it must, that his role was prosecutorial. Rather, Cameo claims that the administrative process was not impartial enough to allow for the defense of absolute immunity as delineated in *Butz.*

In granting immunity to agency officials performing an adjudicatory function, the Court stated that a prerequisite to the protection was a formal system of procedural restraints such as that embodied in the Administrative Procedure Act, Title 5, United States Code. This assurance of impartiality is necessary before an agency adjudicator can be granted immunity. *See Harris v. Powers,* 520 F.Supp. 111 (W.D.Wis. 1981). Cameo raises questions concerning adjudicatory impartiality in order to defeat Willkom's motion. The questions concerning the delegation of power to the hearing examiner and the reversal of another hearing examiner on a subsequent set of NOV's against Cameo are the facts relied upon to dispute the impartiality of the process.

Willkom counters that this analysis is proper only with respect to immunity for adjudicators, not for those positions analogous to prosecutors such as he. There is some persuasive force for this argument. Justice Rehnquist, in concurring with the opinion of the Court on this matter, recognized the differentiation among three types of officials: The adjudicator; the person responsible for the decision to initiate or continue a proceeding; and the person who presents evidence on the record. *Butz,* at 517-518. Willkom is the second type; that is, one who is responsible for continuing a proceeding. The detailed analysis of the administrative process was applied only to the first—the adjudicator.

However, the Court in *Butz* seemed to require impartiality before granting immunity to a person in Willkom's shoes as well.

> We believe that agency officials must make the decision to move forward with an administrative pro-

> ceeding free from intimidation or harassment. *Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal,* we hold that those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision.

*Butz,* at 516 (emphasis supplied).

Assuming the above requires an inquiry into whether the process of adjudicating nursing home citations provides "sufficient checks on agency zeal," the question is whether Willkom has established that the process passes muster. The inquiry has been held to be quite laborious. *See,* for example, *Mason v. Melendez,* 525 F.Supp. 270 (W. D.Wis. 1981). However, the most recent statement on this issue by the Seventh Circuit Court of Appeals has indicated that establishing impartiality is not nearly that difficult.

In *Reed v. Village of Shorewood,* 704 F.2d 943 (7th Cir. 1982), the Court considered an immunity defense raised by a village mayor who also served as the local liquor commissioner. In a course of conduct which can best be described as a vindictive scheme of harassment, a local tavern licensee was driven to give up his liquor license. After deciding that these acts constituted a deprivation of property without due process, the Court proceeded to the immunity question.

With regard to the mayor's acts which could be characterized as falling within the ambit of prosecutor or adjidicator, [sic] the Court stated:

> It is true that the Supreme Court in *Butz* stressed that the Administrative Procedure Act protects the

> independence of administrative law judges and thereby reduces "the risk of an unconstitutional act by one presiding at an agency hearing," and there is no suggestion of such protection here. But *Ashbrook v. Hoffman*, 617 F.2d 474, 476-477 (7th Cir. 1980), decided after *Butz*, held that Indiana's partition commissioners, who have functions in relation to partition sales of real estate analogous to those of Illinois local liquor control commissioners in relation to partition sales of real estate analogous to those of Illinois local liquor control commissioners in relation to liquor licenses, were absolutely immune from damage liability even though as in the present case there was no suggestion that their independence was hedged about by safeguards like those provided by the Administrative Procedure Act. The basis of the absolute immunity of judges is less that they are unlikely to commit wrongs than that their wrongs are largely remedial through the appellate process and that forcing judges to defend their judicial rulings by standing trial on the complaint of a disappointed litigant would make it difficult for them to carry out their judicial duties and for society to recruit competent judges.

Thus, formality of process and absolute independence are not necessary before immunity can be successfully asserted. It is enough that the process provides for appellate review. The fact that the preliminary process may not be insulated from abuse matters not at all. Nor does it matter, although Cameo takes pains to raise the issue, that the standard of review is not *de novo*. *Id.* at 951. It should be noted that another fact, which was influential in both *Butz* and *Reed*, is also present here. Impartiality is, if not established, at least strongly suggested, when the complaining party ultimately prevails in the process, either before an administrative agency (*Reed* at 951) or through appeal to a court of record (*Butz* at 516).

Unquestionably then, Willkom has established sufficient impartiality in the process to allow him to avail himself of the immunity set forth in *Butz*. Cameo's attempts to raise a genuine issue of ultimate fact, while imaginative, must be rejected. The availability of the appellate process, and the fact that Cameo ultimately prevailed in the very administrative process which it contends is insufficiently impartial, leave no doubt that prosecutorial immunity must be granted to Willkom for the decision to continue the prosecution of the NOV's issued against Cameo.

## CONCLUSION

Not even the most liberal inferences in favor of Cameo can create a genuine issue of fact relative to Willkom's liability as a supervisor. In accordance with the principles enunciated in *Rizzo* and *Monell*, it must be concluded that Willkom cannot be assessed liability.

Likewise, there is no genuine issue of fact regarding the issue of prosecutorial immunity. Undisputed facts establish that Willkom qualifies for the absolute immunity granted to those responsible for the decisions to initiate or continue administrative proceedings in *Butz*.

## ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED. Judgment shall be entered in favor of the defendant with prejudice and costs.

Entered this 20th day of October, 1983.

BY THE COURT:

/s/ JOHN C. SHABAZ
District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 83-C-385-S

CAMEO CONVALESCENT CENTER, INC., a corporation organized under the laws of the State of Wisconsin,

Plaintiff,

v.

TERRY WILLKOM, individually and in his official capacity as the Deputy Secretary of the Department of Health and Social Services, of the State of Wisconsin,

Defendant.

COMPLAINT

I.

JURISDICTION VENUE

1. This is a civil action for legal and equitable relief to redress deprivation of rights secured by the First, Ninth, and Fourteenth Amendments to the United States Constitution; and the Civil Rights Act of 1871, 42 U.S.C. § 1983 and by the common law of the State of Wisconsin which provides remedies for the intentional torts of abuse of process, malicious prosecution and libel.

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and § 1343(3) and the Court's pendant jurisdiction to hear state law claims which are factually and legally interwoven with federal claims. Declaratory relief is sought under 28 U.S.C. §§ 2201 and 2202.

3. With respect to all claims, this suit arises under the Constitution and laws of the United States and the State of Wisconsin, and is founded on the existence of a

federal question. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000).

4. The unlawful acts alleged below were committed within the State of Wisconsin and more specifically, within the Western District of the State of Wisconsin, such acts occurring primarily in Dane County, Wisconsin.

## II.

## PARTIES

5. Plaintiff, Cameo Convalescent Center, Inc., is a closely-held corporation organized under the laws of the State of Wisconsin. Its principal place of business is 5790 South 27th Street, Milwaukee, Wisconsin 53221. Its principal business is providing shelter and skilled nursing care to the elderly citizens of the State of Wisconsin, through Cameo Convalescent Center, a licensed nursing home within the meaning of § 50.01(3), Wis. Stats. Cameo Convalescent Center was, at all times, certified as a provider of skilled and intermediate nursing care to elderly citizens who qualified for medicaid benefits from the State of Wisconsin and federal government.

6. Defendant, Terry Willkom, is a citizen of the United States and a resident of the State of Wisconsin, and at all times relevant hereto, occupied the position of Deputy Secretary, Department of Health and Social Services of the State of Wisconsin. This action is brought against Defendant Willkom in his individual capacity and in his official capacity as former Deputy Secretary.

## III.

## STATEMENT OF CLAIM—FIRST CLAIM

7. At all times prior to, during, and following the actions of the defendant hereinafter described, Cameo Convalescent Center provided high quality skilled nursing care to all of its residents in compliance with all state and federal requirements and the plaintiff enjoyed a well-established record and reputation for providing excellent patient care to nursing home residents. Defendant Willkom was, or should have been, aware of this reputation enjoyed by Cameo Convalescent Center.

8. Pursuant to both state and federal laws, the Division of Health conducted annual surveys of nursing homes in the State of Wisconsin to determine whether such facilities were operating in accordance with state and federal regulations and to determine whether the licensure and medicaid certification of such facilities should be continued. Information relative to these surveys is maintained by the Division of Health and the Division Administrator is the custodian of such information.

9. In September of 1978, an annual survey was conducted by certain representatives of the Division of Health and Department of Health and Social Services ("Department"). Such representatives are under the supervision and control of Defendant Willkom and Defendant Willkom was the appointing authority for such persons pursuant to a written delegation of authority from the Secretary of the Department of Health and Social Services.

10. At an exit interview at the completion of the 1978 survey on September 19, 1978, 34 Notices of Violation

were issued to the Plaintiff Cameo Convalescent Center for alleged irregularities in the nursing and social services programs at Cameo Convalescent Center. Under Wisconsin law, the failure of the plaintiff to successfully appeal said Notices of Violation and/or correct the alleged conditions contained therein could have resulted in substantial forfeitures, placement on the suspension of referrals and/or admissions lists, decertification from the medicaid program, loss of nursing home license, loss of individual professional licenses, placement of the nursing home in receivership and/or criminal prosecutions. These Notices of Violation were issued without probable cause or reasonable foundation in fact or law.

11. Defendant Willkom was responsible for the training, oversight, and supervision of surveyors who inspect nursing homes in the State of Wisconsin. He knew, or, in the exercise of a reasonable degree of diligence, should have known, that a number of surveyors, and particularly the Nurse Surveyor who issued 31 of the 34 Notices of Violation referenced in paragraph 9 above, regularly issued Notices of Violation without an adequate legal or factual basis and that the issuance of such Notices of Violation resulted in additional costs to nursing homes and/or damage to nursing homes and their managers and staffs. Defendant Willkom, however, took no action reasonably calculated to correct and prevent such action by the Nurse Surveyor, or surveyors generally, and has therefore duly condoned such actions and adopted them as his own.

12. Plans of Correction for the Notices of Violation were imposed on the plaintiff on October 17, 1978 by employees of the Division of Health who were also under the control and supervision of the defendant. At no time

prior to the imposition of the Plans of Correction was the plaintiff afforded an opportunity for a hearing on the merits of the alleged violations or on its request for an extension of time. Those Plans of Correction required the plaintiff to expend considerable funds in complying with their terms.

13. On October 26, 1978, the imposition of these Plans of Correction was timely appealed by the plaintiff. Applicable state statutes required a hearing on both the appeal of the Notices of Violation and appeal of the Plans of Correction to be commenced within thirty (30) days after the filing of a notice of appeal on the imposed Plans of Correction. Plaintiff was never afforded an opportunity for a hearing, either on the merits of the alleged violations themselves or on the merits of the imposed Plans of Correction, until a hearing was commenced on April 30, 1979, more than 150 days after that appeal was filed.

14. On or about October 26, 1978, a verification visit was conducted at Cameo by the Social Worker Surveyor of the Division of Health who had issued the original Notices of Violation. The purpose of a verification visit is to determine if the facility had complied with the Plans of Correction. Of the three alleged social service violations, all three were reported to be corrected.

15. On January 2, 1979, Jane Preston, a different Nurse Surveyor from the Division of Health than who had conducted the survey, conducted a verification visit at Cameo. Of the 31 nursing violations originally alleged, Ms. Preston found that 24 had been corrected. On four alleged violations, Ms. Preston indicated that the plaintiff had made acceptable progress towards correction and she indicated only three violations remained "uncorrected."

16. On March 14, 1979, the plaintiff was notified that Cameo Convalescent Center was being placed on the suspension of referrals list by the Department. Nursing homes could not be placed on the suspension of referrals list unless there remained at least five uncontested, outstanding, and uncorrected Notices of Violation. A placement on said list precludes the nursing home so placed from accepting any patients referred from County Social Service agencies.

17. On or about March 26, 1979, the Chief Attorney in charge of representing the Division of Health in hearings on alleged Notices of Violation and Plans of Correction personally informed Defendant Willkom that the Notices of Violation which had been issued to Cameo in September of 1978 had no reasonable basis in fact or law and could not be supported in a hearing. Also present during this conversation was Burton Wagner, the Administrative Assistant to the Secretary of the Department of Health and Social Services and one of whose functions was to supervise the operation of the Office of Administrative Hearings and Rules, the office before whom appeals of Notices of Violation and Plans of Correction would be heard. Defendant Willkom, however, ordered that these Notices of Violation should be pursued through the Administrative Hearing process by the Department of Health and Social Services anyway. Said directive by the defendant was done with an improper or ulterior motive and to punish the plaintiff for its exercise of its First and Fourteenth Amendment rights. The failure to dismiss such Notices of Violation was the proximate cause of substantial litigation expense and Cameo being placed on the suspension of referrals list as hereafter described.

18. In March and April of 1979, after Defendant Willkom had instructed the attorney to proceed with the hearings on the appeal, attorneys for the Division of Health, in conjunction with the Nurse Surveyor who had issued the 31 Notices of Violation to Cameo in September of 1978, and the supervisor of Jane Preston, instructed Ms. Preston to change her findings on certain Notices of Violation from "corrected" to "uncorrected".

19. On March 30, 1979, the plaintiff filed a timely appeal of the placement of Cameo Convalescent Center on the suspension of referrals list, notification of which the plaintiff had received on March 21, 1979. State law provides that when an appeal of a placement on a suspension of referrals list is filed, the appealing party may not be actually placed on that list until after the hearing on the matter has been completed. Despite this appeal, previous appeals on the Notices of Violation and Plans of Correction, and without prior hearing on any appeal, Cameo's name was placed on the published suspension of referrals list by the employees of the Division of Health under the direct control and supervision of the defendant, and that list was mailed to all County Social Services Agencies in the State of Wisconsin and to all hospitals and other agencies who refer nursing home patients. Said action damaged the Plaintiff's reputation and further caused the plaintiff substantial monetary losses. This occurred at the time when the defendant was fully aware that the issuance of the Notices of Violation were without probable cause and without reasonable basis in fact or law.

20. On May 21, 1979, agents of the defendant notified the plaintiff that Cameo Convalescent Center had been placed on the suspension of admissions list. Place-

ment on the suspension of admissions list precluded the plaintiff from admitting any new residents at all, regardless of the source of the referral. The basis of the placement was the Notices of Violation and imposed Plans of Correction the status of which had been changed from "corrected" to "uncorrected." This placement occurred when the defendant knew that the Notices of Violation were issued without probable cause and without any reasonable basis in fact or law.

21. On November 30, 1979, all remaining social service Notices of Violation and 9 of the nursing Notices of Violation were dismissed. Considerable numbers of hearings on the remaining Notices of Violation continued until July of 1980, when the defendant finally agreed to dismiss almost all of the outstanding Notices of Violation and to the issuance of an order which treated the remainder as having no legal effect.

22. At all times and in all aspects relevant to the allegations in this complaint, the actions of the defendant, the Department, and its employees, recited herein were taken under color of State law and with the approval, knowledge or consent of the defendant, done in concert with the defendant, or were known and ratified by him. Said actions of the defendant were done willfully and with malice.

## IV.

## VIOLATIONS OF LAW

23. Defendant, through the actions described herein, under color of State law, intentionally and maliciously subjected the plaintiff to the deprivation of rights, priv-

ileges and immunities secured to the plaintiff by the Constitution and laws of the United States, specifically the First, Ninth and Fourteenth Amendments to the United States Constitution and 42 USC §1983.

24. The actions of the defendant, as alleged above, in depriving plaintiff of its liberty and property rights without affording an adequate opportunity for a hearing, constitutes an intentional and malicious violation of plaintiff's rights guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution and 42 USC §1983.

25. The actions of the defendant, as alleged above, constitute intentional and malicious violation of the plaintiff's rights to pursue meaningful and lawful trades and occupations as guaranteed by the Fourteenth Amendment to the United States Constitution, and the penumbras formed by emanations from the specific guarantees of those amendments that help to give them life and substance, and 42 USC §1983.

## V.

## INJURY

26. As a direct and proximate result of the actions of the defendant as set forth above, the plaintiff, Cameo Convalescent Center, Inc., was injured in its business opportunities, commercial reputation, assets, and revenues. It has also suffered substantial out-of-pocket losses due to lost business opportunities and expenses incurred in the reasonable and proper defense against the malicious actions undertaken by the defendant.

## VI.

## PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays that this Court will hear this case at the earliest practicable date, advance this case on the calendar, and upon such hearing will:

1. Issue a declaratory judgment declaring that the defendant's actions as alleged in the complaint violated the plaintiff's rights, privileges, and immunities guaranteed under the First, Ninth and Fourteenth Amendments to the United States Constitution and the penumbras formed by the emanations from the guarantees thereof.

2. Declare that the defendant's imposition of the Plans of Correction, placement on suspension of referrals and suspension of admissions lists, and other sanctions, or that of persons acting in concert with him, prior to a hearing on the merits of the Notices of Violation, is violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

3. Award the plaintiff, Cameo Convalescent Center, Inc., ordinary compensatory damages in the amount of $400,000.00.

4. Award the plaintiff punitive damages in the amount of $30,000.00.

5. Award the plaintiff all of the costs of this action including reasonable attorneys fees.

6. Award the plaintiff such other and further relief as may be just, equitable, and appropriate under the circumstances.

Plaintiff hereby demands trial by jury.

Dated at Madison, Wisconsin, this 21st day of April, 1983.

DeWITT, SUNDBY, HUGGETT & SCHUMACHER, S.C.

/s/ Robert M. Hesslink, Jr.
A Member of the Firm
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*Testimony of Thomas Van de Grift—Mr. Handzel Reading From Questions Posed by Mr. Hesslink:*

Q. Was this one of the things in 1978 or '79 he [Mr. Siegel] expressed some concern which would have been consistent with his statement here, "This citation is a hundred percent unsupportable because of a wholly inadequate investigation and flakey conclusions of law" closed quote?

A. Yes.

Q. He expressed that fairly early on in 1979?

A. Yes.

• • •

Q. What authority did you have at the end of 1978, early part of 1979, when Mr. Siegel was informing as to the problems about a number of these NOV's, what authority did you have yourself to make a decision, to dismiss particular Notices of Violation?

A. None.

Q. Who had the authority to make that decision?

A. Chuck Fiss, or up the ladder up the ladder.

• • •

Q. Do you have a specific recollection of relaying this information to anyone?

A. Yes.

Q. Who?

A. Terry Willkom and Burt Wagner.

Q. When did this occur?

A. I am not sure of the date. I believe it was sometime in late spring or summer of 1979 but I am not clear on that. I would have to do a file search in order to determine accurately the date.

Q. Best as you can recall did you relay this to them at that same time?

A. You mean both at the same time?

Q. Right.

A. Correct.

Q. And, this was one conservation?

A. Correct.

• • •

Q. Do you know whether this meeting occured before or after the June 11, 1979 meeting with Cameo?

A. It must have occurred before, I would think, but I am not certain of that. The reason I say is that we were discussing settlement possibility on June 11, so I think that by that time we must have gotten some okay from our clients to proceed to settlement discussions.

Q. When you say an "okay" from your clients who did you understand to be the client who was making the decision at this point in time?

A. Well, at this time I would have had to go to Chuck Fiss or the administrator of the Division of Health.

(R. 16, Summary Judgment, Ex. 14)

*Testimony of Deposition of Terry Willkom:*

Q. Prior to September of 1977 if you could just give me a very brief summary of your employment history prior to that time.

A. Okay. From May of 1966 which was graduation from college until into approximately 1972, I was employed in hospital administration field and was elected to the State Legislature and began my term in January of 1971 and served through July of 1976, and then was employed in the Department of Health and Social Services. From July of 1976 until September of 1977 I was Administrator of the Division of Vocational Rehabilitation.

(R. 16, Summary Judgment, Ex. 1)

*Testimony of Deposition of Terry Willkom:*

Q. Were you involved in the decisions as to whether to pursue particular litigation, terminate particular litigation?

A. I was involved in influencing those decisions, yes.

Q. In all such decisions?

A. No.

Q. What types were you involved in?

A. Usually those that garnered some kind of publicity that were considered more publicly visible, more controversial kinds of cases.

Q. Was Cameo one of those?

A. I believe Cameo was one of those.

(R. 16, Summary Judgment, Ex. 16)

*Testimony of Deposition of Terry Willkom:*

Q. What was your policy in the situations where you were told there was no doubt, that the violation was totally unsupportable?

A. I don't believe I was ever in a position where I was unequivocally convinced that that was the case.

Q. Were you ever advised that was the case?

A. Yes. I believe by Mr. Van de Grift when we went to Milwaukee and back.

Q. And you indicated that it should be pursued in any event?

A. It was my opinion at that point in time that we should pursue violations.

• • •

Q. The discussion you had with Mr. Van de Grift on the way back from Milwaukee, is it your recollection it was in response to a QAP training program?

A. That's correct.

Q. What is QAP?

A. Quality Assurance Project, which was a methodology, experimental methodology for nursing home surveying.

Q. Is it your best recollection that that meeting would have occurred on March 29, 1979?

A. It would appear to be the approximate time. March 26th.

(R. 16, Summary Judgment, Ex. 15)

*Testimony of Terry Willkom:*

Q. Did you ever advise him [Van de Grift] that there were political pressures against settling?

A. I could have. There definitely were.

Q. What were those pressures?

A. Pressures by legislators and others who felt that the Department approach to trying to settle or bargain out the citations was very wrong in that once a citation was taken, it should definitely be prosecuted, fines and forfeitures levied.

Q. Did Mr. Van de Grift ever advise you he thought it was improper to pursue violations which were unsupported?

A. I don't recall.

Q. What did Mr. Wagner say about this conversation?

A. I believe at the time Mr. Wagner was supportive of my viewpoint.

(R. 11, Affidavit of Terry Willkom)

*Testimony of Donald E. Percy:*

Q. Burton Wagner was—

A. Wagner.

Q. —Wagner was what you called the Executive Assistant?

A. And had the title also of Assistant Secretary, yes.

Q. Mr. Wagner was the person who was responsible, for example, with respect to coordinating with the Office of Administrative Hearings and Rules?

A. Yes. That was his responsibility at that time.

Q And was he the person who you looked to most with respect to reviewing decisions of the Office of Administrative Hearings and Rules?

A. Those decisions that had to come to our office for review, yes.

(R. 16, Summary Judgment, Ex. 17)

April 11, 1979

Mr. Robert M. Hesslink, Jr.
DeWitt, McAndrews & Sundby, S.C.
121 South Pinckney Street
Madison, Wisconsin 53703

RE: Cameo Convalescent Center, Inc.
Case No. DOHE-160-78

Dear Mr. Hesslink:

I am in receipt of your letter of March 27, 1979 appealing the denial by Mr. Thomas Patterson of your Motion to Dismiss the Notices of Violation of Imposed Plans of the Correction in the above-referenced matter.

It would be inappropriate for me to consider your appeal as final decision-making authority has been delegated to the hearing examiner in this case. I am enclosing a copy of that delegation for your information.

Sincerely,

/s/ Donald E. Percy
Secretary

Enclosure

cc: Legal Counsel

(R. 16, Summary Judgment, Ex. 5)

Division of Health

ADMINISTRATIVE ORDER

POLICY

Order Number 1.51-10
Originating Date 1/3/79

SUBJECT: *Delegation of Authority to Hearing Examiners for Hearings Involving Cameo Convalescent Center, Inc.*

Pursuant to the power vested in the Secretary of the Department of Health and Social Services by Sections 15.02 (4) and 227.09(3) (a) of the Wisconsin Statutes, the hearing examiner presiding over Class 3 proceedings concerning alleged violations of Chapter H32, Wisconsin Administrative Code, by Cameo Convalescent Center, Inc. as alleged in Notice of Hearing dated April 2, 1979, is delegated the authority to render the final decision on behalf of the Department of Health and Social Services. This order is issued notwithstanding the decision-making powers to the Administrator of the Division of Health. This order supersedes order 1.51 only in regard to the case or cases specified in this order.

/s/ Donald E. Percy, Secretary
DEPARTMENT OF HEALTH &
SOCIAL SERVICES

Office-Supreme Court, U.S.
FILED
APR 26 1985
ALEXANDER L. STEVAS,
CLERK

No. 84 - 1520

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1984

Cameo Convalescent Center, Inc.

Petitioner,

v.

Terry Willkom,

Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

INTRODUCTION.....1

FACTS.....2

ARGUMENT.....9

I. THERE IS NO REASON TO GRANT CERTIORARI.....9

II. THE ACTIONS OF THE OFFICIAL WERE PROSECUTORIAL AND ENTITLED TO IMMUNITY.....10

III. THERE WERE ADEQUATE LEGAL REMEDIES AVAILABLE UNDER THE WISCONSIN ADMINISTRATIVE CODE AND COURT SYSTEM TO JUSTIFY THE IMMUNITY OF WILLKOM.....18

IV. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.....20

V. CONCLUSION.....22

CASES CITED

Butz v. Economou,
438 U.S. 1978.....9, 10, 16,
.....17, 19, 20, 22

Cameo Convalescent Center, Inc.
v. Senn, et. al.,
738 F.2d 836 (7th Cir. 1984)....1, 2

Cameo Convalescent Center v. Senn,
84-680.....2

Gravel v. United States,
408 U.S. 606 (1972).....12, 14

Guthrie v. WERC,
111 Wis. 2d 447,
331 N.W.2d 331 (1983).....19

Harlow v. Fitzgerald,
457 U.S. 800 (1982).....10, 13, 14

Percy v. Cameo Convalescent Center,
84-505.....1

Pulliam v. Allen,
____U.S.____, 104 S.Ct. 1970
80 L.Ed.2d 565 (1984).....20

Reed v. Village of Shorewood,
704 F.2d 943 (7th Cir. 1980).....20

WISCONSIN STATUTES

50.04 Wis. Stats.....19

Sec. 227 Wis. Stats.....18

Sec. 227.07 Wis. Stats.....18

Sec. 227.15 Wis. Stats.....18

Sec. 227.09(6) Wis. Stats.....18

Sec. 227.19, Wis. Stats.....20

No. 84 -

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1984

Cameo Convalescent Center, Inc.

Petitioner,

v.

Terry Willkom,

Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

## INTRODUCTION

This Petition for Review concerns two pieces of litigation that arose out of the same operative core of facts. The first, Cameo Convalescent Center, Inc. v. Senn, et. al., 738 F.2d 836 (7th Cir. 1984), cert. denied sub nom. Percy v. Cameo Convalescent Center, 84-505, and

Cameo Convalescent Center v. Senn, 84-680. Terry Willkom, the agency's Deputy Secretary at the time of the nursing home investigation which gave rise to the dispute, was not a party in Cameo. The district court had rejected a belated attempt to add him in that action. (Pet. 6, note 4.)

Cameo commenced a separate action against Willkom. The District Court for the Western District of Wisconsin rendered a summary judgment in Willkom's favor which was upheld by the court of appeals. It is that decision which this Petition addresses.

## FACTS

The petitioner's statement of facts contains inaccuracies and misstatements of the events that are relevant to this action.

1. The judgment entered by the district court was a summary judgment and findings were issued. (Pet. 11A.-18A.)

2. Willkom's job functions included making decision whether particular litigation should be terminated. (Pet. 40A.) Although his usual activities did not involve direct involvement in the lower level proceedings initiating the regulatory processes, there is no evidence that Willkom's usual job functions did not involve decisions about whether enforcement actions could continue. (N. 7, finding 18; Pet. 17A.)

3. As of the time of the filing of the complaint, Terry Willkom was no longer the deputy secretary of the department (Pet. 27A.)

4. Contrary to the Petitioner's statement, the record does not indicate

what Fiss did or with whom he consulted. (Pet. 38A.)

5. Willkom was the superior of Fiss and of the administrator. He was the person "up the ladder" (Pet. 37A.) who could make the prosecutorial decision. (Pet. 28A. (par. 9; Pet. 29A. par. 11.) The record indicates that Willkom had the authority to continue the prosecution. Mr. Van de Grift testified that he had no authority to decide if the prosecution should continue. (Pet. 37A.)

6. The record only indicates that an attorney expressed his opinion that some of the charges (NOVs) were not with probable cause. (Pet. 37A.) It was not Willkom's firm opinion that the NOVs were without merit. (Pet. 41A.; Resp. Ap. 22A.)

7 There was no evidence that Willkom believed the actions of the

charging nurse-surveyor were malicious. (Pet. 3A.)

8. At the time of the actions alleged as to Willkom there were appeals by Cameo pending in the administrative procedures.

9. The statute, which at that time provided for a Suspension of Referrals Listing (SORL), also provided for a hearing prior to its issuance if the nursing home appealed. (Pet. 4.) Within a few days after the listing of Cameo, a correction was made and sent out removing Cameo's name from the list. Willkom had no part in the incorrect listing. (Finding 15.)

10. It is speculation whether the listing would have occurred if there had been no administrative proceedings continuing against Cameo. The continued regulatory enforcement and the suspension

of referrals were separate and distinct actions with separate processes. (Pet. 4.) As Petitioner asserts (Pet. at 7, p. 2), after the notice of appeal Cameo should not have been placed on the Suspension of Referrals List (SORL).

11. Prior to the initiation of any of the enforcement actions, and at the time of the survey [inspection] that gave rise to all of these proceedings, Cameo was advised of the findings of the nurse-surveyor [investigator] and was given an informal opportunity to respond. The statutes further provided for elaborate formal hearings (Pet. 4, Resp. Ap. 9A.-10A.) which as the Petitioner states, were then pending. (Pet. 7.)

12. The listing on the SORL did not prevent general admissions to the nursing home but only limited

referrals from Wisconsin county agencies. (Pet. 4.)

13. The March 26, 1979 meeting between Willkom, Van de Grift, and Wagner was a general discussion of enforcement of nursing homes regulations. The "political" question did not involve Cameo specifically. (Resp. Ap. 11.) It involved the intent of legislators as to the need for hearings. Legislators pressured the Department for strict enforcement. (Pet. 42A.)

14. At the time of the March 26 meeting, Willkom did not consider the NOVs unsupportable. (Pet. 41A.) He felt that whether there was support for a charge was a matter of opinion and concluded that the appropriate method to resolve this dispute was with the applicable procedures. (Resp. Ap. 19A.)

15. The March 26 meeting was a discussion whether the administrative action should continue. Willkom said yes and, as alleged in the complaint at paragraph 17 (Pet. 31A.) ordered the action to continue.

> Defendant Willkom, however, ordered that these Notices of Violation should be pursued through the Administrative Hearing process by the Department. . . .

16. Wagner, an attorney agreed the administrative processes should continue. (Pet. 2A.)

17. Willkom believed that the hearing process was the best way to resolve the issue whether the NOVs were supportable or not. (Resp. Ap. 210-211, 213, 231-232.)

18. Despite the Petitioner's contrary assertion, there is no evidence that Willkom's decision was the result of any political pressure specific to Cameo.

## ARGUMENT

### I. THERE IS NO REASON TO GRANT CERTIORARI

The Petitioner contends that there were issues left unresolved by this Court's decision in Butz v. Economou, 438 U.S. (1978) that were not addressed by the decision of the Seventh Circuit Court of Appeals. Those are alleged to be the nature of the governmental duties and the degree of checks on agency zeal, which Petitioner Cameo contends must be established in order to allow prosecutorial immunity; and whether the particular official was acting in a prosecutorial role. Petitioner Cameo appears to contend that the determination whether the functioner is a prosecutor is to be made with reference to some standard of "usual" job duties rather

than by a determination whether the particular actions for which the protection is claimed were prosecutorial in nature.

## II. THE ACTIONS OF THE OFFICIAL WERE PROSECUTORIAL AND ENTITLED TO IMMUNITY

In Harlow v. Fitzgerald, 457 U.S. 800, 811 (1982), this Court held the provision of prosecutorial immunity was to be done through a "functional" approach. The court of appeals also applied a "functional approach" (Pet. 5A.) in concluding that the functions and duties performed by Willkom were "functionally comparable" to the duties of a prosecutor under the Butz v. Economou analysis.

Petitioner Cameo, however, contends that Willkom is not entitled to immunity because his "usual" functions did not

involve prosecution. As indicated above, Petitioner Cameo's factual assertions for this contention are weak; but even assuming that the "majority" of Willkom's duties did not involve prosecution, the record clearly shows that his duties included decisions on the continuance of administrative prosecutions.

The court of appeals and the district court concluded that the decision whether a prosecution should continue is a prosecutorial decision and that the maker of such a decision acted functionally as a prosecutor and was entitled to immunity.

Petitioner Cameo asserts that, because Willkom may have had other duties, and may even have had more non-prosecutorial duties than prosecutorial duties, he was not entitled to the immunity.

A prosecutor, such as a district attorney or an attorney general, will frequently have many duties other than those which may be functionally prosecutorial in nature, and such a person may delegate or leave many decisions to subordinates and only act in certain cases or when asked. In such instances the district attorney or attorney general is still a prosecutor, and entitled to immunity for the prosecutorial decisions. In Gravel v. United States, 408 U.S. 606 (1972), this Court noted that senators and their aides might be absolutely immune for some actions and not immune for others.

That an executive official may have other duties that do not involve prosecutorial duties, even a majority of such duties, does not diminish the right of such a person to claim prosecutorial

immunity when performing duties that are "functionally" prosecutorial. This is particularly so where, as here, the particular decision is within his power and he in fact exercises the decision. The record indicates that Willkom had the authority to continue the prosecution, and that he "ordered" it to continue.

Petitioner Cameo's attempt to rely on Harlow v. Fitzgerald is aside the mark. In Harlow v. Fitzgerald, there was no assertion that anyone had acted in a prosecutorial fashion, and this Court was considering fresh whether presidential aides, as aides, were entitled to absolute or qualified immunity. This Court has already concluded that public policy is served if persons who act in a way "functionally" like a prosecutor are afforded immunity. No balancing is required to reach this conclusion anew;

it is only necessary, as the court of appeals did, to determine if the actions for which the protection is claimed are prosecutorial.

Both the district court (Pet. 21A.) and the court of appeals concluded that Willkom's action were prosecutional. Petitioner Cameo does not appear to contend that the decision to continue the prosecution was not prosecutorial, but contends that on some sort of averaged basis a majority of other duties of Willkom's were non-prosecutorial. The approach of Petitioner Cameo was rejected in Gravel v. United States and in Harlow v. Fitzgerald.

Curiously Petitioner Cameo now asserts that Willkom did not actually order that the prosecution be continued, but that he merely "influenced" the continuation. In its complaint

Petitioner Cameo alleged that Willkom "ordered . . ." (Pet. 31A.) that the Notices should be pursued through the administrative process. The district court found that Willkom "rejected any notion of dropping the prosecution" (Finding 18, Pet. 17A.)

The claim for damages is based on the allegation that Willkom ordered the prosecution to continue. If, as contended now by Petitioner Cameo, Willkom did no more than influence someone else to continue the prosecution, there would be no basis for a claim at all. Willkom admits and acknowledges that he ordered the prosecution to continue as alleged by Petitioner Cameo in the complaint.

Petitioner Cameo also contends that prosecutorial immunity should not be available to Willkom because he is not a

lawyer. This Court has afforded absolute immunity to persons on the basis of whether their actions are functionally prosecutorial without regard to whether or not they are attorneys. In Butz v. Economou, this Court, in a general comment about the likelihood that prosecutors would generally act properly, noted that "[a]dvocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court" (Id. at 512).

It is a long way from this language to a conclusion that a person acting functionally as a prosecutor is not afforded immunity because he does not have a license to practice law. In Butz v. Economou, this Court distinguishes three types of functions in the

administrative process where absolute immunity would attach: 1) the decision maker or quasi-judicial actor; 2) the agency official who makes the decision to "move forward" with the proceedings, and 3) the agency attorney who actually presents the evidence. (Id. at 516).

Willkom clearly fits into the second category, as an agency official who makes the decision to move forward, to continue the administrative proceedings. There is nothing in Butz v. Economou that would limit the protected agency officials to those with law degrees. It is not unusual for the agency heads responsible for making the decision to go forward to be non-lawyers. It is the functional role that they perform, not the chance of their schooling or licensure that determines immunity.

## III. THERE WERE ADEQUATE LEGAL REMEDIES AVAILABLE UNDER THE WISCONSIN ADMINISTRATIVE CODE AND COURT SYSTEM TO JUSTIFY THE IMMUNITY OF WILLKOM.

Petitioner Cameo contends that the administrative procedures were not sufficiently independent to allow the grant of immunity. Petitioner Cameo cites in support of that proposition cases concerning the independence of the decision maker.

The Wisconsin Administrative Code, chapter 227 Wis. Stats., provides for impartial hearing examiners, sec. 227.09(6), (Resp. Ap. 16A.) Wis. Stats., formal proceedings, sec. 227.07 Wis. Stats. (Resp. Ap. 11A.) , and judicial review, sec. 227.15 Wis. Stats. (Resp. Ap. 17A. and 18A.) These procedures, available under the Administrative Code, are in addition to the procedures that were also provided in sec. 50.04, Wis.

Stats. The Wisconsin court system, of course, is also available as a check or remedy against excessive agency zeal. Under Wisconsin decisions, agency action will be set aside if there is even the appearance of a lack of decisional impartiality Guthrie v. WERC, 111 Wis. 2d 447, 331 N.W.2d 331, 334-335 (1983).

The issue in this case, however, involves prosecutorial immunity of the official who decides that the case should go forward. The prosecutor is not expected to be independent in the sense that the hearing examiner should be, and in Butz v. Economou this Court noted that the check on the excessive zeal of such an official was in the availability of legal remedies. The Wisconsin Administrative Code provides not only for

formal decisions and judicial review, but also allows additional proceedings in the court hearing the review (sec. 227.19, Wis. Stats.). The district court found that there were sufficient checks, and in particular found that the process provided for judicial review. See Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir. 1983). This ruling was in accordance with Butz v. Economou.

## IV. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioner Cameo asserts that the court of appeals decision is in conflict with the decision of this Court in Pulliam v. Allen, ____U.S.____, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). Petitioner contends that it brought its claim for

injunctive and declaratory relief as well as for damages. This contention is totally frivolous.

Although the complaint contained a general request for a declaratory judgment, the prayer does not contain any claim for injunctive relief. (Pet. 35A.) Nor does the body of the complaint assert any basis for injunctive relief. At the time that the complaint was filed, Willkom was no longer deputy secretary of the Department. (Pet. 27A.) The complaint specifically alleged that the action was brought against Willkom individually and in his official capacity as "former Deputy Secretary." The complaint contains no allegations of any continuing function or

relationship that would in any way allow any claim for injunctive relief.

Not only does the Petition indicate that Willkom at the time of suit had no role in any of the activities complained of, but the statute providing for the listing on the suspension of referrals list had been repealed a year prior to the commencement of the action.

Neither in the district court or in the court of appeals did Petitioner Cameo assert a claim for injunctive relief.

## V. CONCLUSION

The Petition contains no basis for certiorari. The decision of the court of appeals was directly in line with this Court's ruling in Butz v. Economou, and the extension of immunity to Willkom was

a simple application of settled law. The Petition for Review should be rejected.

Dated this 23rd day of April, 1985.

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# APPENDIX

# APPENDIX

## TABLE OF CONTENTS

**SECTION 50.04 Wisconsin Statutes.....1A**

**SECTION 227.07 Wisconsin Statutes.....11A**

**SECTION 227.09 Wisconsin Statutes.....16A**

**SECTION 227.10 Wisconsin Statutes.....17A**

**SECTION 227.15 Wisconsin Statutes.....18A**

**AFFIDAVIT OF TERRY WILLKOM.....19A**

**TESTIMONY OF TERRY WILLKOM.....20A**

**SECTION 50.04 Wisconsin Statutes**

**50.04 Special provisions applying to licensing and regulation of nursing homes.**

(1) APPLICABILITY. This section applies to nursing homes as defined in s. 50.01 (3).

(2) LICENSED ADMINISTRATOR REQUIRED. No nursing home within the state may operate except under the supervision of an administrator licensed under ch. 456 by the nursing home administrators examining board. If the holder of a nursing home license is unable to secure a new administrator because of the departure of an administrator, such license holder may, upon written notice to the department and upon the showing of a good faith effort to secure a licensed administrator, place the nursing home in the charge of an unlicensed individual subject to conditions and time limitations established by the department, with advice from the nursing home administrator examining board. An unlicensed individual who administers a nursing home as authorized under this subsection is not subject to the penalty provided under s. 456.09.

**(2m)** PLAN OF CARE REQUIRED. No nursing home may admit any patient until a physician has completed a plan of care for the patient. Failure to comply with this subsection is a class "B" violation under sub. (4)(b)2.

**(3)** INSPECTION REPORT. (a) Inspection. The department shall make or cause to be made at least one inspection annually of each nursing home in the state within 120 days prior to license issuance or renewal.

(b) Annual report. The department shall make at least one report on each nursing home in the state annually. All conditions and practices not in compliance with applicable standards within the last year shall be specifically stated. If a violation is corrected, is contested or is subject to an approved plan of correction, the same shall be specified in the annual report. The department shall send a copy of the report to the nursing home and shall provide a copy to any person on request. The department may charge a reasonable fee to cover copying costs.

(c) Posting of notice. The nursing home administrator

shall retain a copy of the most recent annual report prepared by the department under par. (b) and shall post in a place readily visible to residents and visitors, such as the lobby or reception area of the facility, a notice stating that a copy of the report is available for public inspection on request to the administrator and that a copy will be provided by the department upon request for a minimal fee.

**(4)** NOTICE OF VIOLATION; CORRECTION. (a) Notice of violation. If upon inspection or investigation the department determines that a nursing home is in violation of this subchapter or the rules promulgated thereunder, it shall promptly serve a notice of violation upon the licensee. Each notice of violation shall be prepared in writing and shall specify the nature of the violation, and the statutory provision or rule alleged to have been violated. The notice shall inform the licensee of the right to a hearing under par. (e) and of the provisions for placement of the nursing home on the list prepared under par. (d), if applicable. The written notice of a class "A" violation may be written and served by an agent of the

department at the time of the inspection.

(b) Classification of violations. 1. A class "A" violation is a violation of this subchapter or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a nursing home presenting a substantial probability that death or serious mental or physical harm to a resident will result therefrom.

2. A class "B" violation is a violation of this subchapter or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a nursing home directly threatening to the health, safety or welfare of a resident.

3. A class "C" violation is a violation of this subchapter or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a nursing home which does not directly threaten the health, safety or welfare of a resident.

4. Each day of violation constitutes a separate violation. Except as provided

in sub. (5)(a) 4, the department shall have the burden of showing that a violation existed on each day for which a forfeiture is assessed. No forfeiture may be assessed for a condition for which the nursing home has received a variance or waiver of a standard.

(c) Correction. 1. The situation, condition or practice constituting a class "A" violation shall be abated or eliminated immediately unless a fixed period of time, as determined by the department and specified in the notice of violation, is required for correction. If the class "A" violation is not abated or eliminated within the specified time period, the department shall maintain an action in circuit court for injunction or other process against the licensee, owner, operator, administrator or representative of the facility to restrain and enjoin violation of applicable rules, regulations and statutes.

2. At the time of issuance of a notice of a class "B" or "C" violation, the department shall request a plan of correction which is subject to the department's approval. The nursing home shall have 15 days after receipt of notice of

violation in which to prepare and submit a plan of correction which is subject to the department's approval. The nursing home shall have 15 days after receipt of notice of violation in which to prepare and submit a plan of correction but the department may extend this period up to 30 days where correction involves substantial capital improvement. The plan shall include a fixed time period within which violations are to be corrected. If the nursing home plan of correction is substantially in compliance, it may be modified upon agreement between the department and the nursing home to achieve full compliance. If it rejects a plan of correction, the department shall send notice of the rejection and the reason for the rejection to the nursing home and impose a plan of correction. The imposed plan of correction may be modified upon agreement between the department and the nursing home.

3. If the violation has been corrected prior to submission and approval of a plan of correction, the nursing home may submit a report of correction in place of a plan of correction. Such report shall be signed by the administrator under oath.

4. Upon a licensee's petition, the department shall determine whether to grant a licensee's request for an extended correction time. Such petition must be served on the department prior to expiration of the correction time originally approved. The burden of proof is on the petitioner to show good cause for not being able to comply with the original correction time approved.

(d) Suspension of referrals. 1. The department shall prepare on a monthly basis a list containing the names and addresses of all nursing homes with existing class "A" violations as defined in par. (b) 1 or with 5 or more existing violations of any type, for which a plan of correction has been timely submitted to the department under par. (c), for which a plan of correction has been disapproved or for which an approved plan of correction has not been carried out. A copy of the monthly list of violators shall be sent to each county welfare director and each s. 51.42 or 51.437 board director in the county in which each nursing home listed is located. The department shall notify each nursing home placed on the list of such placement

at least 10 days prior to issuance of the list. No nursing home may be placed on the list unless a hearing has been held under par. (e) and a final determination has been made by the department or the time for requesting a hearing has passed and no request has been made. A nursing home shall be removed from the list when all corrections are made or when a plan of correction for all deficiencies is approved by the department. The list shall indicate those nursing homes which have been removed from the list during the prior month.

2. No county social services department or board under s.51.42 or 51.437 may refer persons to nursing homes on the list prepared under this paragraph.

3. No nursing home which is placed on the list prepared under this paragraph due to an existing class"A" violation or due to 5 or more existing class "B" violations may admit residents until it is removed from the list. Violation of this subdivision constitutes a class "B" violation.

4. The department may make exceptions to subd. 2 or 3 where there is a lack of facilities of the same type in

the area sufficient to satisfy the demand for the type of service provided by the home.

5. The department may provide information from the list to any agencies which make referrals to nursing homes.

(e) Hearings. 1. If a nursing home desires to contest any department action under this subsection, including rejection and imposition of a plan of correction, or suspension of referrals or admissions, it shall send a written request for a hearing under s. 227.07 to the department within 10 days of receipt of notice of the contested action. All agency action under this subsection arising out of violation or rejection and imposition of a plan of correction shall be the subject of a single hearing. The department shall commence the hearing within 30 days of the request for hearing, within 30 days of the department's acceptance of a nursing home's plan of correction or within 30 days of the department's imposition of a plan of correction, whichever is later. The department shall send notice to the nursing home in conformance with s. 227.07. Issues litigated at the hearing may not be relitigated at subsequent

hearings under this paragraph arising out of the same violation.

2. The department shall notify the nursing home of its decision to reverse, modify or uphold the contested action within 10 days after the close of the hearing.

**SECTION 227.07 Wisconsin Statutes**

**Contested cases; notice; hearing; records.**

**(1)** In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. Except in the case of an emergency, reasonable notice shall consist of mailing notice to known interested parties at least 10 days prior to the hearing.

**(2)** The notice shall include:

(a) A statement of the time, place, and nature of the hearing, including whether the case is a class 1, 2, or 3 proceeding.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held, and, in the case of a class 2 proceeding, a reference to the particular statutes and rules involved.

(c) A short and plain statement of the matters asserted. If the matters cannot be stated with specificity at the time the notice is served, the notice

may be limited to a statement of the issues involved.

(3) Opportunity shall be afforded all parties to present evidence and to rebut or offer countervailing evidence.

(4) (a) In any action to be set for hearing, the agency or hearing examiner may direct the parties to appear before it for a conference to consider:

1. The clarification of issues.

2. The necessity or desirability of amendments to the pleadings.

3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.

4. The limitation of the number of witnesses.

5. Such other matters as may aid in the disposition of the action.

(b) The agency or hearing examiner presiding at a conference under this subsection shall make a memorandum for the record which summarizes the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the

parties as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements of the parties. Such memorandum shall control the subsequent course of the action, unless modified at the hearing to prevent manifest injustice.

(5) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default. In any proceeding in which a hearing is required by law, if there is no such hearing, the agency or hearing examiner shall record in writing the reason why no such hearing was held, and shall make copies available to interested persons.

(6) The record in a contested case shall include:

(a) All applications, pleadings, motions, intermediate rulings and exhibits and appendices thereto.

(b) Evidence received or considered, stipulations and admissions.

(c) A statement of matters officially noticed.

(d) Questions and offers of proof, objections, and rulings thereon.

(e) Any proposed findings or decisions and exceptions.

(f) Any decision, opinion or report by the agency or hearing examiner.

(7) All staff memoranda and staff data, not admitted as evidence in a contested case, which are submitted to the hearing examiner or officials of the agency in connection with their consideration of the case, are not part of the official record but shall be made a part of the file and shall be served on all parties. Any party may, within 10 days of service of such memoranda or data, submit comments thereon to the examiner or officials and such comments shall also be served on all parties and placed in the file.

(8) A stenographic, electronic or other record of oral proceedings shall be made in any class 2 or class 3 proceeding and in any class 1 proceeding when requested by a party. Each agency may establish rules relating to the transcription of the record into a written transcript and

the providing of free copies of the written transcript. Rules may require a purpose for transcription which is deemed by the agency to be reasonable, such as appeal, and if this test is met to the satisfaction of the agency, the record shall be transcribed at the agency's expense. Rules may require a showing of impecuniousness or financial need as a basis for providing a free copy of the transcript, otherwise a reasonable compensatory fee may be charged. If any agency does not adopt such rules, then it must transcribe the record and provide free copies of written transcripts upon request. In any event, an agency shall not refuse to provide a written transcript if the person making the request pays a reasonable compensatory fee for the transcription and for the copy. This subsection does not apply where a transcript fee is specifically provided by law.

(9) The factual basis of the decision shall be solely the evidence and matters officially noticed.

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**SECTION 227.09 Wisconsin Statutes**

**Hearing exmainers; examination of evidence by agency.**

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**(6)** The functions of persons presiding at a hearing or participating in proposed or final decisions shall be performed in an impartial manner. A hearing examiner or agency official may at any time disqualify himself or herself. In class 2 and 3 proceedings, on the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a hearing examiner or official, the agency or hearing examiner shall determine the matter as part of the record and decision in the case.

**SECTION 227.10 Wisconsin Statutes**

**Decisions.**

Every proposed or final decision of an agency or hearing examiner following a hearing and every final decision of an agency shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence. Every proposed or final decision shall include a list of the names and addresses of all persons who appeared before the agency in the proceeding who are considered parties for purposes of review under s. 227.16. The agency shall by rule establish a procedure for determination of parties.

## Section 227.15 Wisconsin Statutes

**227.15 Judicial review; decisions reviewable.** Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employe trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review, by the labor and industry review commission, and except as otherwise provided by law.

**AFFIDAVIT OF TERRY WILLKOM**

The subject of that discussion as related in the testimony, was a decision that I made and was within my authority as Deputy Secretary. The policy decision which in effect was designed to cause all Notices of Violation issued by surveyors to be tested through the administrative hearing process, and was directed at the Cameo Convalescent Center specifically, but was directed toward all matters pending adjudication and was made based upon all of the factors stated in the testimony which existed at that particular point in time.

**TESTIMONY OF TERRY WILLKOM**

. . . .

Q What did you say to him?

A General context of the conversation as I recall it would have been or was to the extent that at the time we were having a rather significant internal dispute as I understand it in the Bureau between the medically related personnel, i.e. the survey teams and the attorneys, and we were having a difficulty trying to get the two groups together in terms of dealing with the nurses, the pharmacists, the doctors relative to rules of evidentiary hearings and the attorneys to get more sensitive

to medical observation, medical record documentation, and trying to bring those two sides together. In that context Mr. Van de Grift represented one viewepoint; a number of the survey staff represented another. So our context and discussion there was his opinion that a number of citations that were taking place he was having difficulty from a legal standpoint supporting in the hearing process. So we were having generalized discussions around that I think relative to some other experiences that we were having at that time, Hearthside, Walworth County. There was a variety of facilities.

. . . .

Q Did you ever change the policy that once a notice of violation was issued, it was to be pursued regardless of merit?

MR. HOORNSTRA: Objection to the question because I don't think he said it was to be pursued regardless of merit.

Q Regardless of whether it was supportable or not?

A I was not able to get convincing evidence from either side as to what was or was not supportable. In the early stages of the implementation of Chapter 50, it was obvious to me that it was in the eyes of the beholder, that it was an opinion. And we did review history in terms

of our experience as we gained that over a period of time.